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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 80.

THE JACKSONVILLE, MAYPORT, PABLO RAILWAY AND NAVIGATION COMPANY, PLAINTIFF IN ERROR,

vs.

MARY J. HOOPER, HENRY H. HOOPER, Jr., HER HUSBAND, AND WILLIAM F. PORTER, FOR THE USE OF MARY J. HOOPER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

FILED JANUARY 11, 1892.

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1 United States Circuit Court, Fifth Circuit, Northern District of Florida.

Pleas in the circuit court of the United States, fifth circuit, in and for the northern district of Florida, in a certain cause therein, wherein Mary J. Hooper, Henry H. Hooper, her husband, and William F. Porter, for the use of Mary J. Hooper, are plaintiffs and The Jacksonville, Mayport, Pablo Railway & Navigation Company is defendant.

Be it remembered that on the 4th day of December, A. D. 1889, came Mary J. Hooper, Henry H. Hooper, her husband, and William F. Porter, for the use of Mary J. Hooper, as plaintiffs in the case aforesaid, by J. R. Challen, Esq., their attorney, and filed in the clerk's office of the circuit court aforesaid their præcipe for a summons *ad respondendum* in the words and figures following, to wit:

2 In United States Circuit Court, Fifth Circuit, Northern District of Florida.

MARY J. HOOPER and HENRY H. HOOPER, Her Husband,
vs.
JACKSONVILLE, MAYPORT, PABLO RAILWAY & NAVIGATION COMPANY.

Please issue summons *ad respondendum* to the defendant.

J. R. CHALLEN, *Pl'ffs' Att'y.*

Filed Dec. 21st, 1889.

P. WALTER, *Clerk.*

Præcipe for summons.

3 Whereupon a summons *ad respondendum* issued from the clerk's office aforesaid, which, with the return and endorsement thereon, is in the words and figures following:

4 United States Circuit Court, Fifth Circuit, Northern District of Florida.

The President of the United States to the marshal of the northern district of Florida, Greeting:

You are hereby commanded to summon the Jacksonville, Mayport & Pablo Railway and Navigation Company, if it may be found in your district, to be and appear before the circuit court of the United States, fifth circuit and northern district of Florida, at the rule day of said court to be held at the clerk's office, in the city of Jacksonville, on the first Monday of January, 1890, next, to answer unto Mary J. Hooper and Henry H. Hooper, her husband, in said court on a plea of assumpsit, wherein the plaintiff- claims damages to the amount of nine thousand dollars, and have you then and there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of this [SEAL.] court, at the city of Jacksonville, in said district, this the 26th day of Dec., A. D. 1889.

PHILIP WALTER, *Clerk.*

J. R. CHALLEN,
Plaintiffs' Attorneys.

Filed Dec. 20, 1889.

P. WALTER, *Clerk.*

Summons.

5 And afterwards, to wit, on the 30th day of Dec., A. D. 1889, came the plaintiffs, by J. R. Challen, attorney, and filed in the clerk's office aforesaid their declaration in words and figures following, to wit:

6 Circuit Court of the United States, Northern District of Florida.

MARY J. HOOPER and HENRY H. HOOPER, Her Husband,
vs.
THE JACKSONVILLE, MAYPORT, PABLO RAILWAY & NAVIGATION CO.
} Declaration.

Mary J. Hooper and Henry H. Hooper, her husband, plaintiffs, citizens of Ohio, resident at Cleveland, in said State, by James R. Challen, their attorney, sue The Jacksonville, Mayport, Pablo Railway and Navigation Company, defendant, a corporation under the laws of Florida, having its domicile and principal office in Jacksonville, in said State, in an action in covenant.

[On margin:] Amended by inserting in second line, after word State, and William F. Porter, of New York, in the State of New York, for the use of Mary J. Hooper.

For that on the 10th day of July, A. D. 1888, the said plaintiffs and William F. Porter, all of them then of the State of New York, leased and demised by a certain indenture in writing to the said defendant in the northern district of Florida all those certain lots of land in Duval county, Florida, known and described as lots 1, 2, 3, 4, 13, 14, 15, and 16, in block No. 19, as shown on a plat of lands of Burnside Beach, duly of record in the clerk's office of said county of Duval, and the hotel and buildings thereon known as the "San Diego hotel," with all and singular the tenements and appurtenances thereunto belonging and appertaining, and also all and singular the furniture, fixtures, appliances, and appurtenances then in said hotel, for the term of two years thence next ensuing, and the said defendant joined in the execution of said indenture in writing and covenanted to pay for the said premises the yearly rent of

$800.00, payable in equal monthly instalments of $66.67 on
7 the 10th day of each and every month during the continuance of said term, the first payment to be made July 10th, 1888.

By virtue of said lease the defendant entered into the possession of said premises, with the appurtenances, and remained in such possession until on or about the 28th day of November, 1889, using and occupying the same and paying the rent reserved to October 10th, 1889, and the said plaintiffs have kept all the stipulations and covenants in the said indenture contained on their part to be kept and performed according to the true intent and meaning of the said indenture, but the said defendant has not performed, fulfilled, and kept the covenants in the said indenture contained on its part to be performed, fulfilled, and kept according to the true intent and meaning thereof, in this, the said defendant has not paid the plaintiffs the sum of $106.67 of the rent aforesaid for the month of October, from the 10th day thereof, and part of November, A. D. 1889, to wit, to November 28th of said term, and the same is still due and unpaid, although demanded.

The said defendant in said indenture did also further covenant and agree to insure the said premises in the sum of $6,000.00 in a good and responsible insurance company against loss by fire and keep the same so insured during the continuance of said lease for the benefit of the plaintiffs, and the defendant has not performed, fulfilled, and kept the said covenant in said indenture contained on its part to be performed, fulfilled, and kept according to the true intent and meaning thereof, to wit, the said defendant, although often requested after the said indenture was so executed by it and during the term of said indenture, did not and would not insure or cause or procure to be insured and keep insured the said premises in the sum of $6,000.00 or any other sum in a good and responsible
8 or in any other insurancw company against loss by fire for the benefit of the plaintiffs, lessors as aforesaid, according to the form and effect in said indenture specified, but wholly neglected and refused so to do; and during said term by said indenture granted and while said defendant was in possession of the said hotel and buildings, which were of the full value of $6,000.00, and the furniture, fixtures, appliances, and appurtenances upon said premises, to wit, on or about the 28th day of November, 1889, the same were burned and totally destroyed by fire, as the defendant well knew and knows, and the defendant has not in any manner whatever indemnified the plaintiffs under and by virtue of said covenant; the plaintiffs demanded of said defendant indemnity thereunder on or about the 5th day of December, 1889, in the sum, to wit, of $6,000.00, for which sum, in addition to the rents reserved and unpaid as aforesaid, the said defendant was then indebted to the plaintiffs.

For the terms, stipulations, and covenants in said indenture contained, reference being had to the certified copy thereof herewith filed, marked Exhibit "A," will fully and at large appear. Said lease is duly recorded in Deed Book "B. M.," page 383, of the records of Duval county, Florida.

The said William F. Porter has sold and conveyed all his right, title, and interest in said premises to the said Mary J. Hooper, who is entitled to recover under the covenants of said lease.

And so the plaintiffs in fact say that the defendant, although often requested so to do, has not kept the said covenants so by it made as aforesaid, but has broken the same, and to keep the same with the plaintiff- has hitherto neglected and refused and still does neglect and refuse, to the damage of said plaintiffs of $9,000.00, 9 and therefore they bring this suit.

JAMES R. CHALLEN,
Pl'ffs' Att'y.

Endorsement: Circuit court of the United States, northern district of Fla. Mary J. Hooper & Henry H. Hooper, her husband, *vs.* The Jacksonville, Mayport, Pablo R'y and Nav. Co. Declaration. Filed Dec. 30, 1889. Philip Walter, clerk. James R. Challen, pl'ffs' att'y.

10 EXHIBIT "A."

This lease made and entered into this the tenth day of July in the year of our Lord one thousand, eight hundred and eighty-eight by and between William F. Porter, of the county of —— and State of New York and Mary J. Hooper and Henry H. Hooper, Jr., her husband, who joins with her herein in pursuance of the statute of the State of Florida, in such case made and provided, of the county of Duval and State of Florida, parties of the first part, and the Jacksonville, Mayport, Pablo Railway & Navigation Company, a corporation operating and existing under and by virtue of its charter and the laws of the State of Florida in such case made and provided, having its principal place of business in the county of Duval and State of Florida, parties of the second part;

Witnesseth, that the said parties of the first part for and in consideration of the rents hereby reserved and the covenants hereinafter mentioned to be kept and performed by and on the part of the said party of the second part, doth hereby lease and demise unto the said party of the second part, its successors and assigns, all those certain lots, tracts or parcels of land situate, lying and being in the county of Duval and State of Florida at the place called "Burnside" on the Atlantic ocean, known and described as follows: Lots numbered one (1), two (2), three (3), four (4), thirteen (13), fourteen (14), fifteen (15) and sixteen (16) in block numbered nineteen (19), as shown on a map or plat of lands of "Burnside Beach," duly of record in the clerk's office of the county of Duval, and the hotel and buildings thereon, known as the "San Diego hotel," together with all and singular the tenements and appurtenances thereunto belonging and appertaining, and also all and singular the 11 furniture, fixtures, appliances and appurtenances now in said hotel or to the same belonging or appertaining of whatsoever nature, kind and description, and together with all the rights, easements, privileges belonging to said hotel business, or the said premises or appertaining thereto,

To have and to hold the same, the above-described premises and every part and parcel thereof with the appurtenances, together with all the furniture, fixtures and appliances now in said hotel or outbuildings, or belonging or appertaining thereto in any way or manner whatsoever, unto the said party of the second part, its successors or assigns. for and during the full term of two years from the date of these presents thence next ensuing; the said party of the second part yielding and paying therefor unto the said parties of the first part the yearly rent of eight hundred dollars ($800.00) payable in equal monthly instalments on the tenth day of each and every month during the continuance of the term herein demised, said payments to begin and the first payment to be made upon the tenth day of July, A. D. 1888.

The said parties of the first part for themselves, their heirs executors and administrators, hereby covenant to and with the said party of the second part, its successors and assigns, that they have good right, full power and lawful authority to lease and demise the above premises as aforesaid; that the same are free, clear and discharged of all incumbrances, which may affect or impair the free enjoyment and possession of the same during the continuance of said term by the party of the second part, and that said party of the second part, its successors and assigns, shall and may for and during the full period of the term aforesaid, have, hold, occupy, possess and enjoy the above-demised premises and every part and portion thereof,
the furniture, fixtures, appurtenances and appliances unto
12 the same belonging, without any suit, let, disturbance, eviction or molestation of the said parties of the first part, their executors or administrators.

And the said party of the second part, for itself, its successors and assigns, doth hereby covenant with the said parties of the first part, their executors and administrators, that it will well and truly during the continuance of this term pay the said rent hereby reserved, as herein provided, and will make no default therein, and if default shall be made in the payment of said rent and such default shall continue for the space of sixty days, then it shall be optional with the said parties of the first part to consider this case as forfeited, and to re-enter and take possession of said premises.

And the said party of the second part further covenants to use said property as a hotel property, and to keep said hotel open for the accommodation of guests and the traveling public, and upon the termination of this lease will quietly surrender the same, said hereby-demised property, unto the said parties of the first part, in as good condition as the same now are, ordinary wear and tear and damage by the elements excepted.

And the said party of the second part further covenants to take good care of said demised premises and keep the sand filled in around the foundations of the said hotel and buildings, so that the foundations thereof shall not become impaired or damaged.

It is hereby covenanted and agreed by and between the parties hereto, that the said party of the second part shall have the right to erect and maintain such additional buildings and outhouses upon their hereby-demised property, from time to time, during the continuance of this lease, at their own cost and charges, as may
13 be necessary for carrying on said hotel business, and for its convenience and comfort.

It is further covenanted and provided by and between the parties hereto, that in case the said hotel and buildings shall be destroyed by fire, that in that case, that the rents reserved hereby shall cease, until the said parties of the first part shall rebuild the same, and in case the said premises shall be only partially destroyed by fire, that in that case that the rents shall cease in proportion to the amount so rendered uninhabitable, or unfit for the purpose for which said premises are hereby demised, and until the same shall be again put in habitable condition and repair by the said parties of the first part.

And the said parties of the first part hereby covenant to pay all taxes and assessments levied or assessed on said premises during the continuance of this term, and will not do or suffer any act manner or thing by which the free enjoyment of said premises by the party of the second part may be impaired; the party of the second part will make such necessary repairs from time to time as shall become necessary and proper.

And the said party of the second part hereby covenants and agrees to insure the said premises in the sum of six thousand dollars ($6,000.00) in a good and responsible insurance company against loss by fire, and keep the same so insured during the continuance of this lease for the benefit of the said parties of the first part.

It is further covenanted and agreed by and between the parties hereto, that the said party of the second part shall be entitled to use all the lumber and timber now on the said premises belonging to the parties of the first part, in the erection of any build-
14 ings and outhouses that it may deem necessary or desire
during the continuance of this lease, without any charge or compensation therefor, and that upon the termination of this lease if any such buildings or outhouses shall be erected by the said party of the second part, that the said parties of the first part, their heirs, executors, administrators or assigns, shall pay unto the said party of the second part, its successors or assigns, such sum of money for such improvements as the appraised value of such improvements made by the said party of the second part may be ascertained to be worth upon the termination of this lease, not, however, to exceed the sum of one hundred dollars ($100.00).

It is further covenanted and agreed by and between the parties hereto, that the said party of the second part shall have the exclusive right and privilege of an extension of this lease upon the same terms and conditions and for the period of three years from the expiration of this lease.

In witness whereof the parties hereto have hereunto set their hands and seals this the day and year first above written.

JACKSONVILLE, MAYPORT, PABLO RAILWAY & NAVIGATION CO., [SEAL.]
By ALEX. WALLACE, *President.*
WM. F. PORTER, [SEAL.]
By H. H. HOOPER, JR., *Att'y-in-fact.*
H. H. HOOPER. [SEAL.]
MARY J. HOOPER. [SEAL.]

Signed, sealed, and delivered in the presence of us—
H. H. BUCKMAN,
H. H. BOWNE,
As to R. R. Co., H. H. Hooper, Jr., & W. F. Porter.
JOHN MULHOLLAND,
SAM'L E. DUFFY,
As to Mary J. Hooper.

15 STATE OF FLORIDA,
County of Duval.

Personally appeared before me Henry H. Hooper, Jr., to me well known as one of the persons described in and who executed the foregoing lease, and acknowledged that he executed the same for the uses and purposes therein expressed; also appeared before me Henry H. Hooper, Jr., to me well known as the att'y-in-fact of William F. Porter, who acknowledged that he executed said lease for and on behalf of the said William F. Porter and as his, said William F. Porter's, act and deed for the uses and purposes therein expressed.

Also appeared before me Alexander Wallace, to me well known and who executed the foregoing lease on behalf of the said railway company, and acknowledged that he executed the same for and on behalf of the said company, and the said lease as the act — deed of the Jacksonville, Mayport, Pablo Railway & Navigation Company.

Witness my hand and official seal this the 10th day of July, A. D. 1888*6*.

H. H. BUCKMAN, [SEAL.]
Notary Public.

STATE OF NEW YORK,
City and County of New York.

Personally appeared before me Mary J. Hooper, to me well known as one of the persons described in and who executed the foregoing lease and as the wife of Henry H. Hooper, Jr., and the said Mary J. Hooper, being at the time before me separate and apart from her said husband, Henry H. Hooper, Jr., did then and there, upon a separate and private examination before me taken and had
16 separate and apart from her said husband, acknowledge and declare that she did execute and make herself a party to the said lease for the purpose of demising and leasing the said premises as therein specified, and that she did the same freely and volun-

tarily and without any fear, apprehension, compulsion, or constraint of or from her said husband.

Witness my hand and official seal this the 16th day of July, A. D. 1888.

JOHN M. TIERNEY,
Notary Public, N. Y. Co. [SEAL.]

17 In United States Circuit Court, Fifth Circuit, Northern District of Florida.

MARY J. HOOPER and HENRY H. HOOPER, Her Husband,
vs.
JACKSONVILLE, MAYPORT, PABLO RAILWAY & NAVIGATION COMPANY.

Defendant appeared specially January 6th, 1890, to quash the proceedings for improper service; which matter being heard February 6th, 1890, the motion to quash was denied and defendant required to plead or demur by March 3rd, 1890.

18 And afterwards, to wit, on the 3d day of March, A. D. 1890, came the defendant, by H. H. Buckman, attorney, and filed in the clerk's office aforesaid its demurrer in words and figures following, to wit:

19 United States Circuit Court, Fifth Circuit, Northern District of Florida.

MARY J. HOOPER & HENRY H. HOOPER, Her Husband,
vs.
THE JACKSONVILLE, MAYPORT, PABLO RAILWAY & NAVIGATION COMPANY.

And now comes the defendant and demurs to the declaration in the above-entitled cause, and for cause of demurrer says that the same is bad in substance and in form.

That said declaration shows upon the face thereon that if any contract existed as therein set forth that it existed between other parties than the plaintiffs, and that such action is not assignable, it should be brought in the joint names of all parties.

That there are no sufficient or proper parties to such cause, as appears from the face of said declaration.

And for other and divers errors appearing on the face thereof, and defendants demur accordingly and pray judgment.

DOGGETT & BUCKMAN,
Def't's Att'ys.

We hereby certify that in our opinion the foregoing demurrer is well founded in point of law.

DOGGETT & BUCKMAN,
Def't's Att'ys.

STATE OF FLORIDA,
County of Duval.

Personally appeared before me William Wallace, secretary
20 of the defendant company above named, who, being duly sworn, says that the foregoing demurrer is not interposed for delay.

WM. WALLACE.

Sworn to and subscribed before me this 3rd day of March, A. D. 1890.

W. A. BOURS,
Notary Public.

[OFFICIAL SEAL.]

Demurrer to declaration. Filed M'ch 3, 1890. P. Walter, clerk.

21 In United States Circuit Court, Fifth Circuit, Northern District of Florida.

MARY J. HOOPER and HENRY H. HOOPER, Her Husband,
vs.
JACKSONVILLE, MAYPORT, PABLO RAILWAY & NAVIGATION COMPANY.

And now, on motion of plaintiffs to amend *his* declaration herein, it is ordered that such motion be granted, and plaintiffs are hereby allowed to amend their declaration by inserting the words and William F. Porter, for the use of Mary J. Hooper.

CHAS. SWAYNE, *Judge.*

April 7th, 1890.

Order of court. Filed April 7, 1890. P. Walter, clerk.

22 And afterwards, to wit, on the 7th day of April, A. D. 1890, came the defendant, by its attorney, and filed in the clerk's office aforesaid demurrer in words and figures following, to wit:

23 In the Circuit Court of the United States, Fifth Circuit, Northern District of Florida.

MARY J. HOOPER *et al.*
vs.
JACKSONVILLE, MAYPORT, PABLO RAILWAY & NAVIGATION COMPANY.

And now comes the defendant, by its attorney, H. H. Buckman, and demurs to the amended or paper purporting to be the amended declaration filed by the plaintiffs, and for cause of demurrer now says—

That the said declaration and neither of the said several counts contained therein contain any cause of action against this defendant.

That the said — is double, vague, and uncertain.

That the said declaration and each and every count therein is in covenant and yet shows on the face thereof that the said cause of action will not lie.

That attached to the said declaration is a paper purporting to be the contract which is the basis of this suit, which paper is alleged to be a lease between the defendant company and the plaintiffs, and which paper is referred to in each and every count of said declaration and asked and prayed and made a part of said declaration; that each and every count of said declaration declares in covenant and yet the same contains on the face thereof and the face of the said paper made part thereof that the said cause of action will not lie because the said paper is not under seal; that there is no seal of the defendant company to said paper.

24 And for these and divers other errors appearing on the face thereof this defendant doth demur and pray judgment.

H. H. BUCKMAN,
Def't's Att'y.

STATE OF FLORIDA, }
County of Duval. }

Personally appeared before me William Wallace, who, being duly sworn, says he is the secretary of the defendant company, having the custody of the seal of the same, and that the foregoing demurrer is not interposed for delay.

W. WALLACE.

Sworn to and subscribed before me this 7th day of April, A. D. 1890.

[SEAL.]

WM. BOURS,
Notary Public.

I hereby certify that the foregoing demurrer in my opinion is well founded in point of law.

H. H. BUCKMAN,
Def't's Att'y.

Demurrer to declaration. Filed April 7, 1890. P. Walter, clerk.

25 And afterwards, to wit, on the 9th day of May, A. D. 1890, came the plaintiffs, by their attorney, and filed in the clerk's office aforesaid their amended declaration in words and figures following; which said amended declaration was allowed by order of court in words & figures following:

26 Circuit Court U. S., N. Dist. Fla.

MARY J. HOOPER *et al.*
vs.
THE JACKSONVILLE, MAYPORT, PABLO RAILWAY & NAVIGATION CO.

And now come plaintiffs, by James R. Challen, their attorney, and asks leave to file an amended declaration in this case, which is granted, and, it appearing to the court that a copy of said amended declaration has been furnished to counsel for defendant, it is ordered that said defendant do plead or demur within fifteen days.

CHAS. SWAYNE, *U. S. Judge.*

May 9, 1890.

Exception noted.

CHAS. SWAYNE, *U. S. Judge.* [SEAL.]

Endorsement: Circuit court U. S., north. dist. of Fla. Mary J. Hooper *et al. vs.* The J., M., P. R. & N. Co. Entry. Filed May 9th, 1890. Philip Walter, clerk. James R. Challen, att'y.

27 Circuit Court of the United States, Northern District of Florida.

MARY J. HOOPER, HENRY H. HOOPER, Her Husband, and Wm. F. Porter, for the Use of Mary J. Hooper,
vs.
THE JACKSONVILLE, MAYPORT, PABLO RAILWAY AND NAVIGATION COMPANY.
} Amended Declaration.

Mary J. Hooper and Henry H. Hooper, her husband, citizens of the State of Ohio, resident at Cleveland, in said State, and William F. Porter, citizen of New York, resident at Brooklyn, in said State, for the use of said Mary J. Hooper, by James R. Challen, their attorney, sue The Jacksonville, Mayport, Pablo Railway and Navigation Company, defendant, a corporation under the laws of Florida, having its domicile and principal office in Jacksonville, in said State.

First cause of action.

For that on the 10th day of July, A. D. 1888, the said plaintiffs, all of them then of the State of New York, leased and demised by a certain indenture in writing to the said defendants, in the northern district of Florida, all those certain lots of land in Duval county, Florida, known and described as lots 1, 2, 3, 4, 13, 14, 15, and 16, in block No. 19, as shown on a plat of lands of Burnside Beach, duly of record in the clerk's office of said county of Duval, and the hotel and buildings thereon known as the "San Diego hotel," with all and singular the tenements and appurtenances thereunto belonging and appertaining, and also all and singular the furniture, fixtures, appliances, and appurtenances then in said hotel, for the term of two years thence next ensuing, and the said defendants joined in the execution of said indenture in writing and contracted to pay for the said premises the yearly rent of $800.00, payable in
28 equal monthly instalments of $66.67 on the 10th day of each and every month during the continuance of said term, the first payment to be made July 10th, 1888.

By virtue of said lease the defendant entered into possession of said premises, with the appurtenances, and remained in such possession until on or about the 28th day of November, 1888, using and occupying the same and paying the rent reserved to October 10th, 1889, and the said plaintiffs have kept all the stipulations and agreements in the said indenture contained on their part to be kept and performed according to the true intent and meaning of the said indenture, but the said defendant has not performed, fulfilled, and kept the stipulations and agreements in the said indenture contained on its part to be performed, fulfilled, and kept according to the true intent and meaning thereof, in this, the said defendant has not paid the plaintiffs the sum of $106.67 of the rent aforesaid for the month of October, from the 10th day thereof, and part of November, A. D. 1889, to wit, to November 28th of said term, and the same is still due and unpaid, although demanded.

The said defendant in said contract did also further agree, as part of the consideration for such use and occupation, to insure the said premises in the sum of $6,000.00 in a good and responsible insurance company against loss by fire and keep the same so insured during the continuance of said lease for the benefit of the plaintiffs; and the defendant has not performed, fulfilled, and kept the said agreement in said indenture contained on its part to be performed, fulfilled, and kept according to the true intent and meaning thereof, to wit, the said defendant, although often requested after the said indenture was executed by it and during the term of said indenture,
did not and would not insure or cause or procure to be
29 insured and kept insured the said premises in the sum of
$6,000.00 or any other sum in a good and responsible or
in any other insurance company against loss by fire for the benefit of the plaintiffs, lessors as aforesaid, according to the form and effect of such indenture specified, but wholly neglected and refused so to do; and during said term by said indenture granted and while said defendant was in possession of said hotel and buildings, which were of the full value of $6,000.00, and the furniture, fixtures, appliances, and appurtenances upon said premises, to wit, on or about the 28th day of November, 1889, the same were burned and totally destroyed by fire, as the defendant well knew and knows, and the defendant has not in any manner whatever indemnified the plaintiffs under and by virtue of said agreement. The plaintiffs demanded of said defendant indemnity thereunder on or about the 5th day of December, 1889, in the sum, to wit, of $6,000.00, for which sum, in addition to the rents reserved and unpaid as aforesaid, the said defendant was then indebted to the plaintiffs.

For the terms, stipulations, and agreements in said indenture contained, reference being had to the certified copy thereof herewith filed, marked Exhibit "A," will fully and at large appear. Said lease is duly recorded in Deed Book "B. M.," page 363, records of Duval county, Florida.

Second cause of action.

For that on or about the 10th day of July, A. D. 1888, by a certain indenture in writing between the said plaintiffs, then citizens of New York, of the one part, and the said defendant, of the other part, which said indenture was duly sealed, the said plaintiffs leased and demised to the defendant, in the northern district of Florida, all those certain lots of land in Duval county, Florida, 30 known and described as lots 1, 2, 3, 4, 13, 14, 15, and 16, in block No. 19, as shown on a plat of lands of Burnside Beach, duly of record in the clerk's office of said county of Duval, and the hotel and buildings thereon known as the "San Diego hotel," with all and singular the tenements and appurtenances thereunto belonging and appertaining, and also all and singular the furniture, fixtures, appliances, and appurtenances then in said hotel for the term of two years thence next ensuing; and the said defendant joined in the execution of said indenture in writing and covenanted to pay for the said premises the yearly rent of $6,000.00, payable in equal monthly instalments of $66.67, on the 10th day of each and every month during the continuance of said term, the first payment to be made July 10th, 1888.

By virtue of said lease the defendant entered into possession of said premises, with the appurtenances, and remained in such possession until on or about the 28th day of November, 1889, using and occupying the same and paying the rent reserved to October 10th, 1889; and the said plaintiffs have kept all the stipulations and covenants in the said indenture contained on their part to be kept and performed, according to the true intent and meaning of the said indenture, but the said defendant has not performed, fulfilled, and kept the covenants in the said indenture contained, on its part to be performed, fulfilled, and kept according to the true intent and meaning thereof, in this, the defendant has not paid the plaintiffs the sum of $106.67 of the rent aforesaid for the month of October, from the 10th day thereof, and part of November, A. D. 1889, to wit, to November 28th of said month, and the same is still due and unpaid, although demanded.

The said defendant in said indenture did also further covenant and agree to insure the said premises in the sum of $6,000.00 31 in a good and responsible insurance company against loss by fire and kept the same insured during the continuance of said lease for the benefit of the plaintiffs, and the defendant has not performed, fulfilled, and kept the said covenant in said indenture contained on its part to be performed, fulfilled, and kept according to the true intent and meaning thereof, to wit, the defendant, although often requested after the said indenture was so executed by it and during the term of said indenture, did not and would not insure or cause or procure to be insured and keep insured the said premises in the sum of $6,000.00 or any other sum in a good and responsible or in any other insurance company against loss by fire for the benefit of the plaintiffs, lessors as aforesaid, according to the form and effect in said indenture specified, but wholly neglected and refused so to do, and during said term by said indenture granted, and while said defendant was in possession of said hotel and buildings, which were of the full value of $6,000.00, and the furniture, fixtures, appliances, and appurtenances upon said premises, to wit, on or about the 28th day of November, 1889, the same were burned and totally destroyed by fire, as the defendant well knew and knows; and the defendant has not in any manner whatever indemnified the plaintiffs under and by virtue of said covenant. The plaintiffs demanded of said defendant indemnity thereunder on or about the 5th day of December, 1889, in the sum, to wit, of $6,000.00; for which sum, together with the rents reserved, *and which* the said defendant was then indebted to the plaintiffs.

For the terms, stipulations, and covenants in said indenture contained, reference being had to the certified copy thereof, herewith filed, marked Exhibit "A," will fully and at large appear. Said lease is duly recorded in Deed Book "B. B.," page 383, of the
32 records of Duval county, Florida.

The said William F. Porter has sold and conveyed all his right, title, and interest to said premises to the said Mary J. Hooper, who is entitled to recover under the contract and the covenants of said lease.

And so the plaintiffs in fact say that the defendant, although often requested so to do, has not kept the said contracts and covenants so by it made as aforesaid, but has broken the same, and to keep the same with the plaintiff- has hitherto neglected and refused and still does neglect and refuse, to the damage of said plaintiffs of $9,000.00, and therefore they bring this suit.

JAMES R. CHAL-EN,
Plaintiffs' Attorney.

Amended declaration. Filed May 9, 1890. P. Walter, clerk.

33 And afterwards, to wit, on the 23d day of May, A. D. 1890, came the defendant, by its attorney, and filed in the clerk's office aforesaid its demurrer in words and figures following, to wit:

34 In Circuit Court of the United States, Northern District of Florida.

MARY J. HOOPER *et al.*
vs.
JACKSONVILLE, MAYPORT, PABLO R'Y CO.

And now comes the defendant, by its attorney, H. H. Buckman, and demurs to the amended — or paper purporting to be an amended declaration filed by the plaintiffs in the above-entitled cause, and for cause of demurrer says—

That the same is bad in substance and in form.

That the said declaration and neither the several counts thereof contain any cause of action against this defendant.

That the same is double, vague, and uncertain.

That the said declaration does not appear upon the face thereof to have been filed with leave of court.

That it appears that this court has no jurisdiction of the parties.

That the said declaration and each and every count thereof is in covenant, and yet shows upon the face thereof that the said cause of action will not lie.

And for these and for divers other errors appearing on the face thereof this defendant doth demur and prays judgment.

H. H. BUCKMAN,
Def't's Att'y.

STATE OF FLORIDA, }
County of Duval. }

35 Personally appeared before me William Wallace, who, being duly sworn, says that he is the secretary of the defendant company, having the custody of the seal of the same, and that the foregoing demurrer is not interposed for delay.

WM. WALLACE.

Sworn to and subscribed before me this 23rd day of May, 1890.

W. A. BOURS,
[SEAL.] *Notary Public.*

I hereby certify that in my opinion the above demurrer is well founded in point of law.

H. H. BUCKMAN,
Def't's Att'y.

Demurrer to amended declaration. Filed May 23rd, 1890. P. Walter, clerk.

The foregoing demurrer is, on argument this day heard, overruled. Defendants except. Def'ts allowed til- June 21 to plead.
June 3, 1890.

CHAS. SWAYNE, *Judge.*

36 And afterwards, to wit, on the 21st day of June, A. D. 1890, came the defendant, by its attorney, and filed in the clerk's office aforesaid its pleas to jurisdiction in words and figures following, to wit:

Which pleas were afterwards withdrawn and traverses to the declaration filed.

37 And afterwards, to wit, on the 5th day of Jan'y, A. D. 1891, came the defendant, by its attorney, and filed in the clerk's office aforesaid its pleas in words and figures following, to wit:

38 In Circuit Court of United States, Northern District of Florida.

MARY J. HOOPER *et al.*
vs.
JACKSONVILLE, MAYPORT, PABLO RAILWAY AND NAVIGATION COMPANY.

And now comes the defendant and withdraws his plea in abatement heretofore filed herein, to wit, on June 21st, 1890, to the jurisdiction of this court, and for pleas in bar herein says:

1st. For a plea to said declaration and each and every count thereof this defendant says that the alleged lease and indenture of writing, as declared on in plaintiffs' declaration, is not the deed of this defendant.

2nd. And for a further plea in this behalf defendant says that it never covenanted and agreed as in and by said declaration is complained of against it.

3rd. And this defendant, for a further plea in this behalf and to each and every the said counts of said declaration, saith it did not covenant with the plaintiffs as alleged in the said declaration; that the covenant in the said alleged indenture of writing alleged to be thereunder written to insure the alleged demised premises as set forth in said declaration for the sum of six thousand dollars was and is absolutely null and void, in that the said alleged covenant to insure was impossible of performance, which said impossibility of performance was not known at the time of the alleged making of the same.

4th. And this defendant, for a further plea in this behalf and to the said declaration and each and every count thereof, saith that the said alleged covenant and agreement in the said declaration mentioned and each and every of them, even if entered 39 into by this defendant as therein alleged, are and were *ultra vires* and beyond the scope and power of this defendant company to enter into and are absolutely null and void.

5th. And this defendant, for a further plea in this behalf, avers that it never received, held, or possessed the said alleged demised premises or any part thereof or paid any rent therefor or is or was in any way loable to the plaintiffs herein as in said declaration alleged.

H. H. BUCKMAN,
Def't's Att'y.

STATE OF FLORIDA, }
County of Duval. }

Personally appeared before me S. L. Earle, who, being duly sworn, says that he is the superintendent of the said defendant company; that he has heard the foregoing pleas read; that he hath examined into the matter of the same and the record of said company, and that from such examination and upon his knowledge and belief the same are true.

S. L. EARLE.

Sworn to and subscribed before me this 5th day of Jan'y, A. D. 1891.

W. A. BOURS,
[SEAL.] *Notary Public.*

Pleas of defendant. Filed Jan'y 5th, 1891. P. Walter, clerk.

40 And afterwards, to wit, on the 9th day of Jan'y, A. D. 1891, came the plaintiffs, by their attorney, and filed in the clerk's

office aforesaid the demurrer to pleas in words and figures following, to wit:

41 Circuit Court U. S., Northern Dist. of Florida.

MARY J. HOOPER *et al.*
vs.
THE J., M., P. R. & N. Co.

Demurrer to Pleas.

And now comes the plaintiffs and demur to the third plea set up, but not numbered, being the paragraph succeeding that numbered two, for that—

1st. The same is bad in substance and in form.

2nd. The same does not state facts sufficient to constitute a defense to the plaintiffs' cause- of action or either of them.

3rd. The same is alternative and contradictory to the 2nd plea.

And plaintiffs likewise demur to the 4th plea, being the second paragraph succeeding that numbered two, for that—

1st. The same is bad in substance and in form.

2nd. The same does not state facts sufficient to constitute a defense to the plaintiffs' cause- of action or either of them.

And plaintiffs ask the judgment of the court hereon.

JAMES R. CHALLEN,
Plaintiffs' Att'y.

Demurrer to def't's pleas Nos. 3 & 4. Filed Jan'y 9, 1891. P. Walter, clerk.

42 And afterward, on January 22d, 1891, the court made its ruling on the said demurrer to pleas, which is in the words & figures following:

And on the same day, to wit, on the 22 day of Jan'y, A. D. 1891, came the plaintiffs, by their attorney, and filed in the clerk's office aforesaid the joinder of issue in words and figures following, to wit:

43 In the United States Circuit Court, Fifth Circuit, Northern District of Florida.

MARY J. HOOPER and HENRY H. HOOPER, Her Husband,
vs.
JACKSONVILLE, MAYPORT, PABLO RAILWAY & NAVIGATION COMPANY.

And now, on this day, this cause coming on to be heard on demurrer of plaintiffs to defendant's pleas, upon argument and consideration thereof it is ordered that the demurrer be, and the same is, sustained to the plea of *ultra vires* or 4th plea, and that as to the other pleas the said demurrer is overruled. Defendants except.

CHAS. SWAYNE, *Judge.*

Jan'y 22nd, 1891.
3—80

And now comes the plaintiffs and joins issue on defendant'- pleas numbered 1, 2, 3.

J. R. CHALLEN,
Pl'ffs' Att'y.

Jan'y 22, 1891.

Order on demurrer & joinder of issue. Filed Jan'y 22nd, 1891. P. Walter, clerk.

44 In U. S. Circuit Court, 5th Circuit, Northern Dist. of Fla.

MARY J. HOOPER *et al.*
vs.
J., M., P. R'Y Co.

And now comes H. H. Buckman, counsel for defendant, who, being duly sworn, says that J. H. Norton is a material witness in this cause for defendant; that he is absent without the consent or con-ivance of defendant; that he has been subpœnaed; that he expects to prove by said witness that he is an insurance agent in Jacksonville, doing a large insurance business, and was in 1888; that he represents companies both domestic & foreign, insuring all classes of property; that plaintiffs applied to him for insurance on the property in question; that such insurance was refused; that such property was not insurable; that no insurance could be obtained on the same; that defendant cannot go to trial without him.

H. H. BUCKMAN.

Sworn to & subscribed before me this 28th day of May, 1891.
P. WALTER, *Clerk.*

Endorsed: Copy of affidavit. Continuance.

45 And afterwards, to wit, on the 28th day of April, A. D. 1891, at a term of the circuit court of the United States aforesaid, held at the city of Jacksonville, in the State of Florida, in the northern district thereof, came the said plaintiffs and the said defendant, by their respective attorneys, and thereupon came a jury, to wit (record destroyed—names of jury not known), who, being duly elected, tried, and sworn the truth to speak upon the issues joined, having heard the evidence and the charge of the court and the argument of counsel and having considered of their verdict, upon their oaths do say:

See agreement introduced in evidence by defendant as to contract for building hotel, charges of court, verdict of jury, all in words and figures following, to wit:

46 This agreement entered into this — day of ——, A. D. 1887, between H. H. Hooper, Jr., agent and John Hufbauer & George Hufbauer partners as J. & G. Hufbauer.

The said party of the second part hereby agrees to erect, build and complete in a good & workmanlike manner a building for a hotel at Burnside Beach for the party of the first part and to furnish all material for the sum of $2,905. Said building to be built and erected according to the plans and specifications hereto attached.

The said party of the first part to pay the said money from time to time as the work progresses upon the orders of the party of the second part and to be entitled to reserve ten per cent. in his hands at all times of said sum to insure the completion of said building.

The said party of the first part is to deliver all the material on the ground free of charge.

JOHN HUFBAUR. [SEAL.]
GEORGE HUFBAUR. [SEAL.]
H. H. HOOPER, JR., *Agent.* [SEAL.]

Endorsed: Copy agreement between Hufbaur & Hooper, ag't.

47 *Charges of the Judge.*

GENTLEMEN OF THE JURY: This is an action by Mary J. Hooper and Henry H. Hooper, her husband, and William F. Porter, for the use of Mary J. Hooper, against the Jacksonville, Mayport, Pablo Railway & Navigation Company. As you are already aware, the claim of the plaintiffs in this case is founded upon a contract which has been signed, as has been shown you, by William F. Porter and by H. H. Hooper, Jr., att'y-in-fact, by H. H. Hooper, Jr., and by Mary J. Hooper, and also signed by the Jacksonville, Mayport, Pablo Railway & Navigation Co., and sealed by Alexander Wallace, president, as appears by this copy of the contract, which is stated to be and I believe is established to be a certified copy of what was put of record in the matter; another copy of the contract, claiming to be a duplicate copy, has also been put in evidence and read to you, and there has been considerable legal question about these papers. The court will take care of those questions of law, and while, if I were to dispose of it in another way, I might have considerable to say about them I shall only say to the jury that in the opinion of the court these contracts were the contracts of the defendant railroad company and that they bind the company. I am of that *the* opinion as a judge. Counsel are well aware that if that opinion is wrong there is a jurisdiction in another court to which they can go to have it righted, which is furnished in all cases, because one man might not be as correct as nine persons. I charge*d* you, gentlemen of the jury, that these contracts or this is the contract of the defendant company and the company were bound by it.

That being the case, there are but two questions left for you to settle under this paper: First, was it possible to insure that
48 hotel at any time after the signing of this contract and before the fire under any circumstances by the payment of any premium whatever? If it was, they were bound to do it, and if they could do it and did not do it they are liable for the damages that occurred by not doing it. Not would it be expedient or a difficult thing to do, but could it have been done at all by anybody

anywhere. It is the defendants' business in this case—it is their duty—to satisfy you that they were unable to do it. It was with the view of getting one of the witnesses' ideas upon this subject thoroughly and fully that I asked the question—peculiar question—that I did. The answer was, as far as that witness is concerned, that under no circumstances by the payment of any premium would any company that he had anything to do with insure this property for any person. You are to determine and it is for you to determine; it is part of your duty in this case and one of the principal duties which you have to perform in this case to say whether the defendants have satisfied you that it was absolutely impossible to insure this property. If it was, then they could not do an impossible thing, and the plaintiff cannot recover in this case. If they have not so satisfied you of that fact and you believe that it was possible from the evidence, that it was possible at all, and I put this broadly, because the law, in my judgment, is as broad as that—if it was possible at all to carry out the agreement which the company made with the owners of the property to insure for $6,000.00 and they did not do it, then they are liable for not doing it. Its liability in this instance depends upon whether it was possible or not. If you find that it was not possible, you must find your verdict for the defendant company,
and that will be an end of the consideration of the case. If
49 you find from the evidence that it was possible to insure this
property at all, then there will be another question, How much were the owners of the property damaged by their failing to do so? and under that head you come to the consideration of the different testimony—the various testimony given as to the value of the property. I would say to you as to the testimony you are not bound by any man's testimony. You may take it all, if you believe it, you may take part of it, or you are entitled to reject it all. If you agree with one man and disagree with ten others, you may find a verdict upon the testimony of one and against the testimony of ten. If ten men testify to a state of facts which you do not believe and which is absurd and impracticable, you are not bound to find a verdict by it.

I do not intend to say much about the value of this property, except that it ran all the way from $3,150 to $8,000. I am not sure but one witness put it at $10,000. You heard the size of the house, 40 x 50, three stories high, with an attic on top of the same, forty-odd rooms, I believe—I do not remember exactly—and the first three stories plastered and piazza around three sides. The particulars about each little item *is* not important, but the general size of the house.

Most of you know. Most of you own a house or you may have one built, and from that experience and knowledge you will be able to say upon the testimony given whether a house 40 x 50, four stories high, with 40-odd rooms, would cost $3,150, $3,800, $6,000, $8,000, or $10,000, and from that experience and knowledge you will weigh the testimony as given from the stand and come to a conclusion—you should, under your oaths—as to the probable value of the property and which witness under the circumstances is

50 likely to be correct—whose judgment in the matter was likely to be correct. If a man should come and tell you that the house in which you reside, with ten rooms—that he would build it for $10,000 and another one should tell you it would cost $4,000, you would know in your judgment which was correct; so you will do with the witnesses in this case. You will measure their testimony by your judgment and experience and bring in your verdict accordingly. If you find the company was liable under the first charge—if you find they could insure the property—then you will find a verdict for the plaintiff- what the property is worth up to $6,106.67.

The question of rent, gentlemen of the jury, is one for you to determine. The lease shows rent due unless the defendant shows part of it paid. They only claim $106.67 rent and interest from Dec. 5, 1889. If you find for the defendant, your verdict will simply be, We find for the defendant; if you find for the plaintiff-, We, the jury, find for the plaintiff-, assessing the damages for whatever you find them to be, adding the interest to it from Dec. 5th, 1889.

CHAS. SWAYNE, *Judge.*

Charges of court. Filed April 30, 1891. P. Walter, clerk.

51 Circuit Court of the United States, Northern District of Florida.

MARY J. HOOPER *et al.*
vs.
THE JACKSONVILLE, MAYPORT, PABLO RAILWAY AND NAVIGATION COMPANY.

We, the jury in the issue joined, find for the plaintiffs and assess the damages at six thousand seven hundred ninety-eight dollars and seventy cents ($6,798.70).

THEO. H. LIVINGSTON, *Foreman.*

April 30, 1891.

Endorsement: U. S. cir. court, N. dist. Fla. Hooper *et al. vs.* J., M., P. R. & N. Co. Verdict. Filed April 30th, A. D. 1891, and entered in journal. Philip Walter, clerk of said court.

52 Upon the rendition of which said verdict the said defendant, by its attorney, entered a motion for a new trial and in arrest of judgment in the words and figures following, to wit:

That the verdict is contrary to law.

That the verdict is contrary to the evidence.

That the verdict is contrary to the charge of the court.

That the court erred in refusing to give the charges asked for by the defendant, numbered 1, 2, 3, 4, & 6.

That the court erred in giving his charge to the jury on the grounds and exceptions as noted at the time of the giving of the same and on file in this cause.

That the court erred in admitting the certified copy of the alleged contract in evidence.

That the court erred in admitting the so-called duplicate copy of the alleged contract in evidence; that no contract or the *the* alleged contracts admitted in evidence were properly proven; that neither of the said alleged contracts contained the corporate seal of said company nor was it the deed of the said company.

H. H. BUCKMAN,
Att'y for Def't.

Motion — new trial, entered April 30th, 1891.

Which said motion being considered by the court, an order overruling and denying the same and entering judgment for plaintiffs in words and figures following was made:

53 Circuit Court of the United States, Northern District of Florida.

MARY J. HOOPER, HENRY H. HOOPER, Her Husband, & WM. PORTER, for the Use of MARY J. HOOPER,
v.
THE JACKSONVILLE, MAYPORT, PABLO RAILWAY AND NAVIGATION COMPANY.

Judgment Entry.

This cause coming on to be heard upon the motion to set aside the verdict and for a new trial was submitted without argument, and thereupon the plaintiffs, by James R. Challen, their counsel, voluntarily remit the sum of seven dollars from the interest as computed and allowed in the verdict, and the court after due consideration overrules said motions of defendant and grants said remittitur of plaintiffs.

Wherefore it is ordered and adjudged that the plaintiffs do recover of and from the defendant the sum of six thousand seven hundred and ninety-one $\frac{70}{100}$ dollars, with interest from April 30, 1891, to this day, amounting to six thousand seven hundred and ninety-nine dollars, with 8 per cent. interest from this day, together with costs, taxed at $125.00, for which execution is awarded.

Done in court this May 5th, A. D. 1891.

(Signed) CHARLES SWAYNE,
U. S. Judge.

Endorsement: Circuit court United States, northern dist. of Florida. Mary J. Hooper *et al. v.* The J., M., P. R. & N. Co. Judgment entry. Filed and entered of record May 5th, 1891. Philip Walter, clerk of U. S. court. Filed May 30th, 1891. Philip Walter, clerk. James R. Challen, pl'ffs' att'y.

54 And afterwards, to wit, on the night of May 18th, in the year of our Lord one thousand eight hundred and ninety-one, the records of this court were destroyed by fire, including the records in this cause, while in the clerk's office of said court.

55 And during the said term and on the 8th day of June, A. D. 1891, the said defendant made up and tendered, upon due notice to the plaintiffs' attorney, his bill of exceptions, which were settled and signed by the judge and ordered to be made a part of the record; which said bill of exceptions is in the words and figures following, to wit:

56 United States Circuit Court, Fifth Circuit, Northern District of Florida.

Be it remembered that — a term of the circuit court for the fifth circuit of the United States for the northern district of Florida, held at Jacksonville on the 28th day of April, in the year of our Lord one thousand eight hundred and ninety-one, a cause therein pending, wherein Mary J. Hooper, Henry H. Hooper, her husband, and William F. Porter, for the use of Mary J. Hooper, were plaintiffs and The Jacksonville, Mayport, Pablo Railway & Navigation Company, a corporation operating and existing under the laws of the State of Florida, was defendant, came on to be heard before the Hon. Charles Swayne, sitting as judge of said court, at which day came the said parties, by their respective attorneys, and the defendant, by its counsel, moved the said court to continue said cause on the ground of the absence of a material witness, and filed the following affidavit:

(Here insert the affidavit.) See attached 1.

In U. S. Circuit Court, 5th Circuit, Northern Dist. of Fla.

MARY J. HOOPER *et al.*
vs.
J., M., P. R'Y Co.

# 1.

And now comes H. H. Buckman, counsel for defendant, who, being duly sworn, says that J. H. Norton is a material witness in this cause for defendant; that he is absent without consent or connivance of defendant; that he has been subpœnaed; that he expects to prove by said witness that he is an insurance agent in Jacksonville, doing a large insurance business, and was in 1888; that he represents companies, both domestic & foreign, insuring all classes of property; that plaintiff applied to him for insurance on the property in question; that such insurance was refused; that such property was not insurable; that no insurance could be obtained on the same; that defendant cannot safely go to trial without him. 57

H. H. BUCKMAN.

Sworn to and subscribed before me this 28th day of May, 1891.
P. WALTER, *Clerk.*

Endorsed: Copy of affidavit — continuance.

But the said judge did then and there deliver this opinion and decide that the said motion for a continuance of said cause should not be granted; to which said decission and ruling of the said judge the defendant, by its att'y, did then and there except.

And thereupon the said issues in manner aforesaid joined between the said parties came on to be tried, and the jurors of the jury aforesaid, whereof mention is within made, being called, likewise came and were sworn to try the said issues in manner aforesaid joined, and thereupon the plaintiffs, to maintain the issues on their part, offered in evidence a paper-writing purporting to be, as stated by counsel, a copy of what purported to be a lease from the plaintiffs to the defendant.

(Here insert paper.) See attached 2.

2.

This lease made and entered into this the tenth day of July in the year of our Lord one thousand, eight hundred and eighty-eight by and between William F. Porter of the county of —— and State of New York and Mary J. Hooper and Henry H. Hooper, Jr., her husband, who joins with her herein in pursuance of the statute of the State of Florida in such case made and provided, of the county of Duval, and State of Florida, parties of the first part, and the Jacksonville, Mayport, Pablo Railway & Navigation Company, a corporation operating and existing under and by virtue of its charter and the laws of the State of Florida in such case made and provided, having its principal place of business in the county of Duval and State of Florida, parties of the second part: 58

Witnesseth, that the said parties of the first part for and in consideration of the rents hereby reserved and the covenants hereinafter mentioned to be kept and performed by and on the part of the said party of the second part, doth hereby lease and demise unto the said party of the second part, its successors and assigns, all those certain lots, tracts or parcels of land situate, lying and being in the county of Duval and State of Florida at the place called "Burnside" on the Atlantic ocean, known and described as follows: Lots numbered one (1), two (2), three (3), four (4), thirteen (13), fourteen (14), fifteen (15) and sixteen (16), in block numbered nineteen (19), as shown on a map or plat of lands of "Burnside Beach," duly of record in the clerk's office of the county of Duval, and the hotel and buildings thereon known as the "San Diego hotel," together with all and singular the tenements and appurtenances thereunto belonging and appertaining, and also all and singular the furniture, fixtures, appliances and appurtenances now in said hotel or to the same belonging or appertaining of whatsoever nature, kind and description, and together with all the rights, easements, privileges, belonging to said hotel business, or the said premises or appertaining thereto:

To have and to hold the same, the above-described premises and every part and parcel thereof with the appurtenances, together with all the furniture, fixtures and appliances now in said hotel or outbuildings, or belonging or appertaining thereto in any way or
manner whatsoever unto the said party of the second part,
59 its successors or assigns, for and during the full term of two
years from the date of these presents thence next ensuing; the said party of the second part yielding and paying therefor unto the said parties of the first part the yearly rent of eight hundred dollars ($800.00) payable in equal monthly instalments on the tenth day of each and every month during the continuance of the term herein demised, said payments to begin and the first payment to be made upon the tenth day of July, A. D. 1888.

The said parties of the first part for themselves, their heirs, executors and administrators, hereby covenant to and with the said party of the second part, its successors and assigns, that they have good right, full power and lawful authority to lease and demise the above premises as aforesaid; that the same are free, clear and discharged of all incumbrances, which may affect or impair the free enjoyment and possession of the same during the continuance of said term by the party of the second part, and that said party of the second part, its successors and assigns shall and may for and during the full period of the term aforesaid, have, hold, occupy, possess and enjoy the above-demised premises and every part and portion thereof, the furniture, fixtures, appurtenances and appliances unto the same belonging, without any suit, let, disturbance, eviction or molestation of the said parties of the first part, their executors or administrators.

And the said party of the second part, for itself, its successors and assigns, doth hereby covenant with the said parties of the first part, their executors and administrators, that it will well and truly during the continuance of this term pay the said rent hereby re-
served, as herein provided, and will make no default therein,
60 and if default shall be made in the payment of said rent and
such default shall continue for the space of sixty days, then it shall be optional with the said parties of the first part to consider this lease as forfeited, and to re-enter and take possession of said premises.

And the said party of the second part further covenants to use said property as a hotel property, and to keep said hotel open for the accommodation of guests and the traveling public, and upon the termination of this lease will quietly surrender the same, said hereby-demised property, unto the said parties of the first part, in as good condition as the same now are, ordinary wear and tear and damage by the elements excepted.

And the said party of the second part further covenants to take good care of said demised premises and keep the sand filled in around the foundations of the said hotel and building, so that the foundation thereof shall not become impaired or damaged.

It is hereby covenanted and agreed by and between the parties hereto, that the said party of the second part shall have the right to erect and maintain such additional buildings and outhouses upon their hereby-demised property, from time to time, during the continuance of this lease, at their own cost and charges, as may be necessary for carrying on said hotel business, and for its convenience and comfort.

It is further covenanted and provided by and between the parties hereto, that in case the said hotel and buildings shall be destroyed by fire, that in that case, that the rents reserved hereby shall cease, until the said parties of the first part shall rebuild the same, and in case the said premises shall be only partially destroyed by fire, that in that case that the rents shall cease in proportion to the amount
61 so rendered uninhabitable, or unfit for the purpose for which said premises are hereby demised, and until the same shall be again put in habitable condition and repair by the said parties of the first part.

And the said parties of the first part hereby covenant to pay all taxes and assessments levied or assessed on said premises during the continuance of this term, and will not do or suffer any act, manner or thing by which the free enjoyment of said premises by the party of the second — may be impaired; the party of the second part will make such necessary repairs from time to time as shall become necessary and proper.

And the said party of the second part hereby covenants and agrees to insure the said premises in the sum of six thousand dollars ($6,000.00) in a good and responsible insurance company against loss by fire, and keep the same so insured during the continuance of this lease for the benefit of the said parties of the first part.

It is further covenanted and agreed by and between the parties hereto, that the said party of the second part shall be entitled to use all the lumber and timber now on the said premises belonging to the parties of the first part, in the erection of any buildings and outhouses that it may deem necessary or desire during the continuance of this lease, without any charge or compensation therefor, and that upon the termination of this lease if any such buildings or outhouses shall be erected by the said party of the second part, that the said parties of the first part, their heirs, executors, administrators or assigns, shall pay unto the said party of the second part, its successors or assigns, such sum of money for such improvements as the appraised value of such improvements made by the said party of the second part may be ascertained to be worth
62 upon the termination of this lease, not, however, to exceed the sum of one hundred dollars ($100.00).

It is further covenanted and agreed by and between the parties hereto, that the said party of the second part shall have the exclusive right and privilege of extension of this lease upon the same terms and conditions for the period of three years from the expiration of this lease.

In witness whereof the parties hereto have hereunto set their hands and seals this the day and year first above written.

JACKSONVILLE, MAYPORT, PABLO RAILWAY & NAVIGATION CO., [SEAL.]
By ALEX. WALLACE, *President.*
WM. F. PORTER, [SEAL.]
By H. H. HOOPER, JR., *Att'y-in-fact.* [SEAL.]
H. H. HOOPER.
MARY H. HOOPER. [SEAL.]

Signed, sealed, and delivered in presence of us:
H. H. BUCKMAN,
H. H. BOWNE,
As to R. R. Co., H. H. Hooper, Jr., & W. T. Porter.
JOHN MULHOLLAND,
SAM'L E. DUFFY,
As to Mary J. Hooper.

STATE OF FLORIDA, }
County of Duval. }

Personally appeared before me Henry H. Hooper, Jr., to me well known as one of the persons described in and who executed the foregoing lease, and acknowledged that he executed the same for the uses and purposes therein expressed; also appeared before me Henry H. Hooper, Jr., to me well known as the att'y-in-fact of William F. Porter, who acknowledged that he executed said lease for and on behalf of the said William F. Porter and as his, said William F. Porter's, act and deed for the uses and purposes therein expressed.

Also appeared before me Alexander Wallace, to me well known and who executed the foregoing lease on behalf of the said railway company, and acknowledged that he executed the same for and on
behalf of the said company, and the said lease as the act and
63 deed of the Jacksonville, Mayport, Pablo Railway & Naviga-
tion Company for the uses and purposes therein expressed.

Witness my hand and official seal this the 10th day of July, A. D. 1888.

H. H. BUCKMAN,
Notary Public. [SEAL.]

STATE OF NEW YORK, }
City and County of New York. }

Personally appeared before me Mary J. Hooper, to me well known as one of the persons described in and who executed the foregoing lease and as the wife of Henry H. Hooper, Jr., and the said Mary J. Hooper, being at the time before me separate and apart from her said husband, Henry H. Hooper, Jr., did then and there, upon a separate and private examination before me taken and had separate and apart from her said husband, acknowledge and declare that she did execute and make herself a party to the said lease for the purpose of demising and leasing the said premises as therein specified, and that she did the same freely and voluntarily and without any fear, apprehension, compulsion, or constraint of or from her said husband.

Witness my hand and official seal this the 16th day of July, A. D. 1888.

JOHN M. TIERNEY,
[SEAL.] *Notary Public, N. Y. Co.*

Endorsed: William M. Porter *et al.* to Jacksonville, Mayport, Pablo Railway & Navigation Company. Copy of lease.

and called to the stand to prove the same and the issues in their behalf MARY J. HOOPER, one of the plaintiffs, who, being duly sworn, testified as follows:

64 I am one of the plaintiffs in this suit.

Q. (Paper handed witness, paper purporting to be copy of lease.) Is that paper the original?

A. I do not know; original was left with Mr. Buckman, who was our attorney. I have not got it in my possession; this is an original copy. I never had this paper or the original recorded. This is my signature to this paper.

Cross-examination:

Q. How do you know that what you call the original of what you call this paper was left with me (Buckman)?

A. Well, I know it as I would know anything.

Q. Were you not absent at the time and out of the State?

A. I think I was.

Q. Who told you, then, that was left with me?

A. That is my understanding.

To the admission of the testimony given by the said Mary J. Hooper defendant objected and moved to strike out the same as being irrelevant, uncertain, and hearsay, but the said judge did then and there deliver his opinion and decide that the objection of the said defendant ought not to be allowed and overruled said motion; which decision of the said judge defendant, by its att'y, did then and there except.

And the plaintiffs, to further prove the issues in their behalf and the said paper-writing offered in evidence, called upon and introduced the defendant's counsel, H. H. BUCKMAN, as a witness, who, being sworn, testified as follows:

Q. Are you the att'y for the def't?

A. Yes, sir.

65 Q. (Paper referred to as being copy of what purported to be lease between plaintiffs and defendant handed witness, being the same paper handed plaintiff when on the stand.) Who drew that paper?

A. I did.

Q. Is that your signature as a witness to the paper; is that the signature of Alexander Wallace?

A. Yes, sir.

Q. You were served with a subpœna to produce the original of the paper which is in your hands. Have you or your company got that paper?

A. I have not, nor to my knowledge has the company. This paper I hold in my hands is not a copy, but an original. These are the original signatures to the paper, Alex. Wallace and my signature as witness and Hooper's signature. I never saw this paper after it was taken out of my hands, immediately after the signing by Alex. Wallace and myself as a witness, from that date until the commencement of this suit, when I borrowed this identical paper from you (meaning pl'ffs' att'y) to get a copy of it. The railroad company did not have one in its possession and I did not.

Q. Is that your signature and notarial seal as notary purporting to take the acknowledgment of this instrument?

A. Yes, sir.

Q. Was not the original of that paper left in your possession by Mrs. Hooper or Mr. Hooper?

A. It was not. I never saw Mrs. Hooper in the transaction. She was not here. This paper was delivered to Mr. Hooper or Capt. Wallace after they signed it, to be sent away to Mrs. Hooper to execute. I was not the att'y for Hooper or Mrs. Hooper at the time.
I did not represent them in any way and had not been repre-
66 senting them for a considerable length of time. I refused to
do business for Mr. Hooper some months before that and had him ruled before the court because he would not pay me my bill for services previously rendered.

Pl'ffs' counsel here offers in evidence what purports to be a certified copy of the original of what purported to be a lease between the plaintiffs and defendant.

(Here refer to the lease already copied, simply adding to it the certificate marks.) See attached 3.

3.

This lease made and entered into this the tenth day of July in the year of our Lord one thousand eight hundred and eighty-eight by and between William F. Porter of the county of —— and State of New York and Mary J. Hooper and Henry H. Hooper, Jr., her husband, who joins with her herein in pursuance of the statute of the State of Florida in such case made and provided, of the county of Duval and State of Florida, parties of the first part, and the Jacksonville, Mayport, Pablo Railway & Navigation Company, a corporation operating and existing under and by virtue of its charter and the laws of the State of Florida in such case made and provided, having its principal place of business in the county of Duval and State of Florida, parties of the second part:

Witnesseth, that the said parties of the first part for and in consideration of the rents hereby reserved and the covenants hereinafter mentioned to be kept and performed by and on the part of the said party of the second part, doth hereby lease and demise unto the said party of the second part, its successors and assigns, all those certain lots, tracts or parcels of land situate, lying and being in the county of Duval and State of Florida at the place called "Burnside" on the Atlantic ocean, known and described as follows:

67 Lots numbered one (1), two (2), three (3), four (4), thirteen (13), fourteen (14), fifteen (15) and sixteen (16), in block numbered nineteen (19), as shown on a plat or map of lands of "Burnside Beach," duly of record in the clerk's office of the county of Duval, and the hotel and buildings thereon known as the "San Diego hotel," together with all and singular the tenements and appurtenances thereunto belonging and appertaining, and also all and singular the furniture, fixtures, appliances and appurtenances now in said hotel or to the same belonging or appertaining of whatsoever nature, kind and description, and together with all the rights, easements, privileges belonging to said hotel business, or the said premises or appertaining thereto.

To have and to hold the same, the above-described premises and every part and parcel thereof with the appurtenances, together with all the furniture, fixtures and appliances now in said hotel or outbuildings, or belonging or appertaining thereto in any way or manner whatsoever unto the said party of the second part, its successors or assigns, for and during the full term of two years from the date of these presents thence next ensuing; the said party of the second part yielding and paying therefor unto the said parties of the first part the yearly rent of eight hundred dollars ($800.00) payable in equal monthly instalments on the tenth day of each and every month during the continuance of the term herein demised, said payments to begin and the first payment to be made upon the tenth day of July, A. D. 1888.

The said parties of the first part for themselves, their heirs executors and administrators, hereby covenant to and with the said party of the second part, its successors and assigns, that they have good right, full power and lawful authority to lease and demise the 68 above premises as aforesaid; that the same are free, clear and discharged of all incumbrances, which may affect or impair the free enjoyment and possession of the same during the continuance of said term by the party of the second part, and that said party of the second part, its successors and assigns shall and may for and during the full period of the term aforesaid, have, hold, occupy, possess and enjoy the above-demised premises and every part and portion thereof, the furniture, fixtures, appurtenances and appliances unto the same belonging, without any suit, let, disturbance, eviction or milestation of the said parties of the first part, their heirs, executors or administrators.

And the said party of the second part, for itself, its successors and assigns, doth hereby covenant with the said parties of the first part, their executors and administrators, that it will well and truly during the continuance of this term, pay the said rent hereby reserved, as herein provided, and will make no default therein, and if default shall be made in the payment of said rent and such default shall continue for the space of sixty days, then it shall be optional with the said parties of the first part to consider this lease as forfeited, and to re-enter and take possession of said premises.

And the said party of the second part further covenants to use said property as a hotel property, and to keep said hotel open for the accommodation of guests and the traveling public, and upon the termination of this lease will quietly surrender the same, said hereby-demised property, unto the said parties of the first part, in as good condition as the same now are, ordinary wear and tear and damage by the elements excepted.

And the said party of the second part further covenants to take good care of said demised premises and keep the sand filled 69 in around the foundations of the said hotel and building, so that the foundations thereof shall not become impaired or damaged.

It is hereby covenanted and agreed by and between the parties hereto, that the said party of the second part shall have the right to erect and maintain such additional buildings and outhouses upon their hereby-demised property, from time to time, during the continuance of this lease, at their own cost and charges, as may be necessary for carrying on said hotel business, and for its convenience and comfort.

It is further covenanted and provided by and between the parties hereto, that in case the said hotel and buildings shall be destroyed by fire, that in that case, that the rents reserved hereby shall cease, until the said parties of the first part shall rebuild the same, and in case the said premises shall be only partially destroyed by fire, that in that case that the rents shall cease in proportion to the amount so rendered uninhabitable, or unfit for the purpose for which said premises are hereby demised, and until the same shall be again put in habitable condition and repair by the said parties of the first part.

And the said parties of the first part hereby covenant to pay all taxes and assessments levied or assessed on said premises during the continuance of this term and will not do or suffer any act, manner or thing by which the free enjoyment of said premises by the party of the second — may be impaired; the party of the second part will make such necessary repairs from time to time as shall become necessary and proper.

And the said party of the second part hereby covenants and agrees to insure the said premises in the sum of six thousand dollars ($6,000.00) in a good and responsible insurance company against loss by fire, and keep the same so insured during the 70 continuance of this lease for the benefit of the said parties of the first part.

It is further covenanted and agreed by and between the parties hereto, that the said party of the second part shall be entitled to use all the lumber and timber now on the said premises belonging to the parties of the first part, in the erection of any buildings and outhouses that it may deem necessary or desire during the continuance of this lease, without any charge or compensation therefor, and that upon the termination of this lease if any such buildings or outhouses shall be erected by the said party of the second part, that the said parties of the first part, their heirs, executors administrators or assigns, shall pay unto the said party of the second part, its successors or assigns, such sum of money for such improvements as the appraised value of such improvements made by the said party of the second part may be ascertained to be worth upon the termination of this lease, not, however, to exceed the sum of one hundred dollars ($100.00).

It is further covenanted and agreed by and between the parties hereto, that the said party of the second part shall have the exclusive right and privilege of an extension of this lease upon the same terms and conditions for the period of three years from the expiration of this lease.

In witness whereof the parties hereto have hereunto set their hands and seals this the day and year first above written.

JACKSONVILLE, MAYPORT, PABLO RAILWAY & NAVIGATION CO., [SEAL.]
By ALEX. WALLACE, *President.*
WM. F. PORTER, [SEAL.]
By H. H. HOOPER, JR., *Att'y-in-fact.*
H. H. HOOPER, JR. [SEAL.]
MARY J. HOOPER. [SEAL.]

Signed, sealed, and delivered in the presence of us—

H. H. BUCKMAN,
H. H. BOWNE,
As to R. R. Co., H. H. Hooper, Jr., & W. F. Porter.
JOHN MULHOLLAND.
SAM'L E. DUFFY,
As to Mary J. Hooper.

71 STATE OF FLORIDA, }
County of Duval. }

Personally appeared before me Henry H. Hooper, Jr., to me well known as one of the persons described in and who executed the foregoing lease, and acknowledged that he executed the same for the uses and purposes therein expressed; also appeared before me Henry H. Hooper, Jr., to me well known as the att'y-in-fact of William F. Porter, who acknowledged that he executed said lease for and on behalf of the said William F. Porter and as his, said William F. Porter's, act and deed for the uses and purposes therein expressed.

Also appeared before me Alexander Wallace, to me well known and who executed the foregoing lease on behalf of the said railway company, and acknowledged that he executed the same for and on behalf of the said company, and the said lease as the act and deed of the Jacksonville, Mayport, Pablo Railway & Navigation Company for the uses and purposes therein expressed.

Witness my hand and official seal this the 10th day of July, A. D. 1888.

H. H. BUCKMAN,
Notary Public. [SEAL.]

STATE OF NEW YORK,
City and County of New York. }

Personally appeared before me Mary J. Hooper, to me well known as one of the persons described in and who executed the foregoing lease and as the wife of Henry H. Hooper, Jr., and the said Mary J. Hooper, being at the time before me separate and apart from her said husband, Henry H. Hooper, Jr., did then and there, upon a separate and private examination before me taken and had separate and apart from her said husband, acknowledge and declare 72 that she did execute and make herself a party to the said lease for the purpose of demising and leasing the said premises, as therein specified, and that she did the same freely and voluntarily and without any fear, apprehension, compulsion, or constraint of or from her said husband.

Witness my hand and official seal this the 16th day of July, A. D. 1888.

JOHN M. TIERNEY, [SEAL.]
Notary Public, N. Y. Co.

STATE OF NEW YORK,
City and County of New York. }

I, James A. Flack, clerk of the city and county of New York and also clerk of the supreme court for the said city and county, the same being a court of record, do hereby certify that John H. Tierney, whose name is subscribed to the certificate of the proof or acknowledgment of the annexed instrument and thereon written, was at the time of taking such proof *of* acknowledgment a notary public in and for the city and county of New York, dwelling in the said city, commissioned and sworn and duly authorized to take the same; and, further, that I am well acquainted with the handwriting of such notary and verily believe that the signature to the said certificate of proof or acknowledgment is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of said court and county the 16th day of July, 1888.

JAMES A. FLACK, *Clerk.* [SEAL.]

73 STATE OF FLORIDA,
County of Duval, } *ss:*

Be it remembered that on this 28th day of July, A. D. 1888, I, clerk of the circuit court in and for said county, have duly recorded the foregoing lease in the public records of said county.

In witness whereof I have hereunto set my hand and the seal of said court this day and year above written.

[Seal Circuit Court.]

T. E. BUCKMAN, *Clerk,*
By W. L. BETTES, *D. C.*

ance of this lease, without any charge or compensation therefor, and that upon the termination of this lease if any such buildings or outhouses shall be erected by the said party of the second part, that the said parties of the first part, their heirs, executors administrators or assigns, shall pay unto the said party of the second part, its successors or assigns, such sum of money for such improvements as the appraised value of such improvements made by the said party of the second part may be ascertained to be worth upon the termination of this lease, not, however, to exceed the sum of one hundred dollars ($100.00).

It is further covenanted and agreed by and between the parties hereto, that the said party of the second part shall have the exclusive right and privilege of an extension of this lease upon the same terms and conditions for the period of three years from the expiration of this lease.

In witness whereof the parties hereto have hereunto set their hands and seals this the day and year first above written.

JACKSONVILLE, MAYPORT, PABLO RAILWAY & NAVIGATION CO., [SEAL.]
By ALEX. WALLACE, *President.*
WM. F. PORTER, [SEAL.]
By H. H. HOOPER, JR., *Att'y-in-fact.*
H. H. HOOPER, JR. [SEAL.]
MARY J. HOOPER. [SEAL.]

Signed, sealed, and delivered in the presence of us—

H. H. BUCKMAN,
H. H. BOWNE,
As to R. R. Co., H. H. Hooper, Jr., & W. F. Porter.
JOHN MULHOLLAND.
SAM'L E. DUFFY,
As to Mary J. Hooper.

71 STATE OF FLORIDA, }
County of Duval. }

Personally appeared before me Henry H. Hooper, Jr., to me well known as one of the persons described in and who executed the foregoing lease, and acknowledged that he executed the same for the uses and purposes therein expressed; also appeared before me Henry H. Hooper, Jr., to me well known as the att'y-in-fact of William F. Porter, who acknowledged that he executed said lease for and on behalf of the said William F. Porter and as his, said William F. Porter's, act and deed for the uses and purposes therein expressed.

Also appeared before me Alexander Wallace, to me well known and who executed the foregoing lease on behalf of the said railway company, and acknowledged that he executed the same for and on behalf of the said company, and the said lease as the act and deed of the Jacksonville, Mayport, Pablo Railway & Navigation Company for the uses and purposes therein expressed.

Witness my hand and official seal this the 10th day of July, A. D. 1888.

H. H. BUCKMAN,
Notary Public. [SEAL.]

STATE OF NEW YORK,
City and County of New York. }

Personally appeared before me Mary J. Hooper, to me well known as one of the persons described in and who executed the foregoing lease and as the wife of Henry H. Hooper, Jr., and the said Mary J. Hooper, being at the time before me separate and apart from her said husband, Henry H. Hooper, Jr., did then and there, upon a separate and private examination before me taken and had separate and apart from her said husband, acknowledge and declare 72 that she did execute and make herself a party to the said lease for the purpose of demising and leasing the said premises, as therein specified, and that she did the same freely and voluntarily and without any fear, apprehension, compulsion, or constraint of or from her said husband.

Witness my hand and official seal this the 16th day of July, A. D. 1888.

JOHN M. TIERNEY, [SEAL.]
Notary Public, N. Y. Co.

STATE OF NEW YORK,
City and County of New York. }

I, James A. Flack, clerk of the city and county of New York and also clerk of the supreme court for the said city and county, the same being a court of record, do hereby certify that John H. Tierney, whose name is subscribed to the certificate of the proof or acknowledgment of the annexed instrument and thereon written, was at the time of taking such proof of acknowledgment a notary public in and for the city and county of New York, dwelling in the said city, commissioned and sworn and duly authorized to take the same; and, further, that I am well acquainted with the handwriting of such notary and verily believe that the signature to the said certificate of proof or acknowledgment is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of said court and county the 16th day of July, 1888.

JAMES A. FLACK, *Clerk.* [SEAL.]

73 STATE OF FLORIDA,
County of Duval, } *ss:*

Be it remembered that on this 28th day of July, A. D. 1888, I, clerk of the circuit court in and for said county, have duly recorded the foregoing lease in the public records of said county.

In witness whereof I have hereunto set my hand and the seal of said court this day and year above written.

[Seal Circuit Court.]

T. E. BUCKMAN, *Clerk,*
By W. L. BETTES, *D. C.*

STATE OF FLORIDA,
County of Duval.

I, T. E. Buckman, clerk of the circuit court, do hereby certify the foregoing is a true copy from the records of my office.

[Seal Ct. *Ct.* Court.]

T. E. BUCKMAN, *Clerk*,
By W. L. BETTES, *D. C.*

Endorsed: William F. Porter *et al.* to Jacksonville, Mayport, Pablo Railway & Navigation Company. Certified copy lease.

74 WILLIAM F. PORTER and MARY J. HOOPER and HENRY H. HOOPER, JR., Her Husband, and JACKSONVILLE, MAYPORT, PABLO RAILWAY AND NAVIGATION COMPANY. } Lease.

This lease made and entered into this the tenth day of July in the year of our Lord one thousand eight hundred and eighty-eight by and between William F. Porter, of the county of —— and State of New York, and Mary J. Hooper and Henry H. Hooper Jr. her husband who joins with her herein in pursuance of the statute of Florida, in such case made and provided, of the county of Duval and State of Florida parties of the first part, and the Jacksonville Mayport, Pablo Railway and Navigation Company, a corporation operating and existing under and by virtue of its charter and the laws of the State of Florida, in such cases made and provided, having its principal place of business in the county of Duval and State of Florida parties of the second part. Witnesseth that the said parties of the first part for and in consideration of the rents hereby reserved and the covenants hereinafter mentioned to be kept and performed by and on the part of the said party of the second part doth hereby lease and demise unto the said party of the second part, its successors and assigns, all those certain lots or parcels of land situate, lying and being in the county of Duval and State of Florida at the place called "Burnside" on the Atlantic ocean known and described as follows: Lots numbered one (1) two (2) three (3) four (4) thirteen (13) fourteen (14) fifteen (15) and sixteen (16) in block numbered nineteen (19), as shown on a plat or plan of lands of
75 "Burnside Beach" duly of record in the clerk's office of the county of Duval and State of Florida and the hotel and buildings thereon known as the "San Diego hotel" together with all and singular the tenements and appurtenances thereunto belonging and appertaining and also all and singular the furniture, fixtures, appliances and appurtenances now in said hotel or to the same belonging or appertaining of whatsoever nature kind and description, and together with all the rights easements privileges

belonging to said hotel premises, or the said premises or appertaining thereto.

To have and to hold the same the above-described premises and every part and parcel thereof with the appurtenances, together with all the furniture fixtures and appliances now in said hotel or outbuildings or belonging or appertaining thereto in any way or manner whatsoever unto the said party of the second part its successors or assigns, for and during the full term of two years from the date of these presents, thence next ensuing. The said party of the second part yielding and paying therefor unto the said parties of the *second* part the yearly rent of eight hundred dollars ($800.00) payable in equal monthly installments on the tenth day of each and every month during the continuance of the term herein demised, said payment to begin and the first payment to be made upon the tenth day of July, A. D. 1888.

The said parties of the first part for themselves their heirs executors and administrators hereby covenant to and with the said party of the second part its successors and assigns, that they have good right full power and lawful authority to lease and demise the above premises as aforesaid, that the same are free clear and discharged of all incumbrances which may affect or impair the enjoyment and possession of the same during the continuance of said term 76 by the party of the second part and that said party of the second part its successors and assigns shall and may for and during the full period of the term aforesaid have hold occupy possess and enjoy the above-demised premises and every part and portion thereof the furniture fixtures appurtenances and appliances unto the same belonging, without any suit let disturbance eviction or molestation of the said parties of the first part their heirs executors or administrators.

And the said party of the second part for itself its successors and assigns doth hereby covenant with the said parties of the first part their executors and administrators that it will — and truly during the continuance of the term pay the said rent hereby reserved and herein provided, and will make no default therein, and if default shall be made in the payment of said rent and such default shall continue for the space of sixty days then it shall be optional with the said party of the first part to consider their lease as forfeited and to re-enter and take possession of the said premises. And the said party of the second part further covenants to use said property as a hotel property and to keep said hotel open for the accom*i*dation of guests and traveling public and upon the termination of this lease, will quietly surrender the same said hereby-demised property unto the said parties of the first part, in as good condition as the same now are, ordinary wear and tear and damage by the elements excepted.

And the said party of the second part further covenants to take good care of said demised premises and keep the sand filled in

around the foundations of the said hotel and buildings, so that the foundations thereof shall not become impaired or damaged? It *is* the said party of the second — shall have the right to erect
77 and maintain such additional buildings and outhouses upon the hereby-demised property from time to time during the continuance of this lease, at their own cost and charges, as may be necessary for carrying on said hotel business and for its convenience and comfort.

It is further covenanted and provided by and between the parties hereto, that in case the said hotel and buildings shall be destroyed by fire, that in that case the rents reserved hereby shall cease, until the said parties of the first part shall rebuild the same, and in case the said premises shall be only partially destroyed by fire, that in that case, that the rents shall cease in proportion to the amount so rendered uninhabitable or unfit for the purposes for which said premises are hereby demised, and until the same shall be again put in habitable condition and repaired by the said parties of the first part. And the said parties of the first *ap*rt hereby covenant to pay all taxes and assessments levied or assessed on said premises during the continuance of this time, and will not do or suffer any act, manner or thing of which the free enjoyment of said premises by the party of the second part may be impaired. The said party of the first part will make such necessary repairs from time to time as shall become necessary and proper.

And the said party of the second part hereby covenants and agrees to insure the said premises in the sum of six thousand dollars ($6,000.00) in a good and responsible insurance company against loss by fire and keep the same so insured during the continuance of this lease for the benefit of the said parties of the first *ap*rt.

It is further covenanted and agreed by and between the *ap*rties hereto that the said party of the second part shall be entitled to use all the lumber and timber now on the said premises belong-
78 ing to the parties of the first part in the erection of any buildings and out — of this lease without any charge or compensation therefor, and that upon the termination of this lease if any such buildings or outhouses shall be erected by the said party of the second part that the said parties of the first part their heirs executors, administrators or assigns shall pay unto the said party of the second part its successors or assigns such sum of money for such improvements as the appraised value of such improvements made by the said party of the second part may — ascertained to be worth, upon the termination of this lease, not, however, to exceed the sum of one hundred dollars (100.00).

It is further covenanted and agreed by and between the parties hereto that the said party of the second part shall have the exclusive right and privilege of extension of this lease upon the same terms and conditions for the period of three years from the expiration of this lease.

In witness whereof the parties hereto have hereunto set their hands and seals this the day and year first above written.

JACKSONVILLE, MAYPORT, PABLO RAILWAY AND NAVIGATION COMPANY, [SEAL.]
By ALEX. WALLACE, *President.*
WM. F. PORTER, [SEAL.]
By H. H. HOOPER, JR., *Att'y-in-fact.*
H. H. HOOPER, JR. [SEAL.]
MARY J. HOOPER. [SEAL.]

Signed, sealed, and delivered in the presence of us:
H. H. BUCKMAN,
H. H. BOWNE,
As to R. R. Co., W. F. Porter, and H. H. Hooper, Jr.

As to Mary J. Hooper:
JOHN N. TIERNEY.
EDWARD F. REILLY.

79 STATE OF FLORIDA,
County of Duval.

Personally appeared before me Henry H. Hooper, Jr., to me well known as one of the persons described in and who executed the foregoing lease, and acknowledged that he executed the same for the uses and purposes therein expressed; also appeared before me Henry H. Hooper, Jr., to me well known as the attorney-in-fact of William F. Porter, who acknowledged that he executed said lease for and on behalf of the said William F. Porters — act and deed for the uses and purposes therein expressed; also appeared before me Alexander Wallace, to me well known and who executed the foregoing lease on behalf of the said railway company, and acknowledged that he executed the same for and on behalf of the said company, and the said lease as the act and deed of the Jacksonville, Mayport, Pablo Railway & Navigation Company for the uses and purposes therein expressed.

Witness my hand and official seal this the 10th day of July, A. D. 1888.

[SEAL.] H. H. BUCKMAN,
Notary Public.

STATE OF NEW YORK,
City and County of New York.

Personally appeared before me, Mary J. Hooper, to me well known as one of the persons described in and who executed the foregoing lease and as the wife of Henry H. Hooper, Jr., and the said Mary J. Hooper, being at the time before me separate and apart from her said husband, Henry H. Hooper, Jr., did then and there, upon
80 a separate and private examination before me taken and had
separate and apart from her said husband, acknowledge and declare that she did execute and make herself a party to the said

lease for the purpose of demising and releasing the said premises as therein specified, and that she did the same freely and voluntarily and without any fear, apprehension, compulsion, or constraint of or from her said husband.

Witness my hand and official seal this 16th day of July, A. D. 1888.

JOHN M. TIERNEY,
Notary Public, New York Co. [SEAL.]

STATE OF NEW YORK,
City and County of New York.

I, James A. Flack, clerk of the city and county of New York and also clerk of the supreme court of the said city and county, the same being a court of record, do hereby certify that John M. Tierney, whose name is subscribed to the certificate of the proof or acknowledgment of the annexed instrument and thereon written, was at the time of the taking such proof or acknowledgment a notary public in and for the said city and county of New York, dwelling in the said city, commissioned and sworn and duly authorized to take the same, and, further, that I am well acquainted with the handwriting of such notary and verily believe that the signature to the said certificate of proof or acknowledgment is genuine.

In testimony whereof I have hereunto set my hand and affixed seal of the said court and county the 16th day of July, 1888.

[SEAL.] JAMES A. FLACK, *Clerk.*

81 STATE OF FLORIDA, *ss:*
County of Duval,

Be it remembered that on this 28th day of July, A. D. 1888, I, clerk of the circuit court in and for said county, have duly recorded the foregoing lease in the public records of said county.

In witness whereof I have hereunto set my hand and the seal of said court this day and year above written.

[SEAL.] T. E. BUCKMAN, *Clerk,*
By W. L. BETTES, *D. C.*

Compared with record in Book B. M., p. 387, '8, '9, this 29th Sep. and also this 28th day of November, A. D. 1891.

JAMES R. CHALLEN.

UNITED STATES OF AMERICA, *ss:*
Northern District of Florida,

James R. Challen, being first duly sworn, says that he made the foregoing letter-press copy from the certified copy furnished him as attorney for the plaintiff- and attached as an exhibit — the declaration in the case of Mary J. Hooper *et al. v.* The Jacksonville, Mayport, Pablo Railway & Navigation Co. and has since compared the same with the record in Book B. M., pages 387, '8, & '9, and so far as the seal-marks are concerned and in all particulars the above is a true copy of the record aforesaid, and he further says that in said record there is nowhere to be found words describing any seal, but the plain word "seal" is used.

JAMES R. CHALLEN.

82 Sworn to and subscribed before me this Dec. 9th, A. D. 1891.

PHILIP WALTER, *Clerk.*

Endorsed: Lease. Mary J. Hooper *et al.* to The Jacksonville, Mayport, Pablo Railway & Navigation Co. Filed Dec. 9, 1891. Philip Walter, clerk. Circuit court of the United States, northern district of Florida. Mary J. Hooper *et al. v.* The J., M., P. R. R. & N. Co. Copy of the recorded lease and affidavit in support of same.

83 To the introduction of which paper in evidence defendant's counsel objected, first, because such purported certified copy is not admissible in evidence, as the original is not sufficiently accounted for; second, that according to the testimony of the witnesses the original document is here before the court in the hands of the pl'ffs' counsel and has been testified to as such; third, that neither the original document or certified copy are admissible in evidence, as neither have or purport to have the corporate seal of the Co.; fifth, that the same is not sufficiently proven to admit either in evidence; sixth, that it appears on the face of both
84 the original and certified copy that it is not the deed of the company, because there is no corporate seal attached nor is it tested, as the laws of said company require.

But the said judge did then and there deliver his opinion and decision that the objection of the defendant ought not to be allowed, and that said writing, which purported to be a certified copy of the purported instrument, ought to be admitted in evidence on the part of the plaintiffs, and thereupon permitted the said writing to be read in evidence on the part of the plaintiff- and decided that said instrument was the deed of the said defendant company; to which said opinion and decision the att'y for the defendant in its behalf did then and there except.

This testimony of Roberts & Warriner is inserted at request of pl'ffs' att'y and on direction of judge, which defendant's att'y excepts to as unnecessary and only encumbers the record.

Mrs. MARY ROBERTS, another witness produced on behalf of the plaintiffs, being duly sworn, testified as follows:

I know the parties to this suit. I knew Alexander Wallace in his lifetime. He is dead; he died some time in 1889. I rented the hotel from April 1st to Nov., 1889. I rented it from Mr. Warriner, secretary of the Co.; Mr. Wallace was president; he told me me to go to Mr. Warriner. I paid Mr. Warriner one month's rent. I have got a receipt from him. I have it here for $75.

Witness produces a receipt signed by C. F. Warriner, sec'ty of the company, with the corporate seal attached.

Def't's counsel objects to the testimony on the ground that Alex.
Wallace is dead, and that there was no opportunity for counsel to
disprove the statement of the witness; that the same was
85 irrelevant and uncertain and no authority was proven from
the directors of the railroad Co. to empower the treasurer or
secretary to rent the hotel or to receive any money on that account;
that it was not railroad business.

The objection is overruled. Counsel allowed an exception, which is noted.

Pl'ffs' counsel offers in evidence receipt produced by the witness, which is objected to on the same ground as above, no authority shown for the giving of the receipt; that the hotel business was not part of the business of the Co.

Objection overruled. Exception noted. Receipt admitted in evidence.

By the WITNESS: This was the Palmetto hotel, the same hotel in dispute here. I was to get a lease from Capt. Wallace; he was to sign the lease. Capt. Wallace is dead. The lease was never signed; remained in the premises until Nov. 29th, when it was burned. I returned to Warriner $800 in accounts, which accounts I had turned over in payment of rent. I gave the accounts to Warriner. The size of the hall down-stairs was 16 feet; the rooms were about 10 x 12; there were nine rooms on the first floor, dining-room, office, sitting-room, and a parlor; 9 rooms on the second floor, 9 rooms on the third floor; on the fourth floor there were 8 rooms; no hall on the fourth floor; can't say how the fourth floor was finished; think it was ceiled; the balance lathed and plastered; there was a kitchen and laundry; there were four servants' rooms over the kitchen; there was also a laundry; can't say as to the windows; think there were four panes to each window.

Q. Is it not possible there was only one pane to each window?

A. It is possible that they were only single-pane glass to each window.

86 Q. Did you ever have any conversation with Alexander Wallace in relation to this hotel?

A. Yes, sir.

Def't's counsel here objects to the introduction in evidence of any conversation between Alex. Wallace in relation to this property, as Alex. Wallace is dead, and the same is otherwise irrelevant and improper, and the railroad company is not sufficiently connected with it. Objection overruled. Exception allowed and noted.

Counsel gives notice he objects to all the testimony of this witness and will move to strike it out.

By the WITNESS: I remember a conversation with Capt. Wallace. Mrs. Wallace, Capt. Wallace, and I were at his house down at the beach. Mr. Challen (referring to the counsel for the plaintiffs) came in. Capt. Wallace said to you, Why don't you try and get insurance on that property? I have tried it and cannot. Capt. Wallace said he did not want to pay $6,000 if the hotel burned. You will understand this conversation was all by the way of a joke.

Q. Did you have any further conversation with Capt. Wallace as to his offering to purchase the property for $8,000?

A. I don't recollect any conversation of that kind.

All the foregoing testimony of the witness, and especially the conversation referred to with Capt. Wallace, counsel for the def't moves to strike out as being immaterial, uncertain, and improper, particularly so as no authority is shown on the part of the railroad Co. to Capt. Wallace for making such statement or authorizing the secretary of the Co. to make such a receipt or to have anything to do with this hotel or to receive any rent therefrom. Objection overruled. Exception noted.

87 C. F. WARRINER, a witness called on behalf of the plaintiffs, being duly sworn and examined, testified as follows:

I was secretary of the railroad Co. in 1888, secretary & treasurer; H. S. Ming was sup't; H. H. Buckman was att'y of the Co. I never had possession of the original lease. The lease was in the possession of H. S. Ming, in his office. I think I saw it there once in the presence of Capt. Wallace, Mr. Solary, Mr. Togni, and Mr. Ming. This was just after I made my annual report in 1889, in Jan'y or Feb'y; I cannot say exactly.

Q. Was this lease ever recorded?

A. I don't know. The property was leased to Mrs. Roberts. I drew up the lease. Mr. Togni and I went down there and took an inventory of the property. I never knew the property was leased to the railroad Co. until Ming took charge of it and sent in report. There is nothing on the minutes of the railroad Co. to show that the railroad Co. or the board of directors had leased — rented the hotel. The minutes do not show anything in regard to it. I rented the hotel to her and received the money from the rent of the hotel. The money was either paid by Ming or Wallace.

Q. Have you the books of the Co.?

A. I have not.

The cash book of the Co. being in court upon *subpœna duces tecum* to produce it, witness recognized the book as the cash book of the Co., and taking up the book and looking over it says:

I don't like to testify positively in regard to this matter because I made a mistake once before. I prefer to look at the book.

Looking at cash book, says:

There is a hotel ac. I notice in the hotel ac. Mrs. Roberts $75 for rent of hotel. I gave her the receipt in evidence. I
88 notice report from Mr. Ming, sup't, hotel ac. so much. I cannot say whether any rent was ever paid Mrs. Hooper or any one for her. These acs. do not show the payment of any rent. The report of Mr. Ming shows the hotel ac., so much for hotel ac.; expenditures was for running hotel and for some improvements.

Q. How large was that hotel?

A. I do not know; it was not a very large house. I should say somewhere about 41 rooms, all told. It was very small for a hotel, but large for a house.

Cross-examination:

Q. You say that the minutes of the directors do not show any resolution or act on their part in relation to this hotel?

A. No; the books of the Co.; the minutes of the directors show nothing of the kind. I kept the minutes.

Q. Did you ever receive any authority or direction from the directors of the Co. to give that receipt or to receive rent from the hotel or do anything in regard to it or in connection with the hotel?

A. I do not understand exactly.

Q. Did you ever receive any authority from the board of directors of this company to give that receipt to Mrs. Roberts or do anything or make any entries for the Co. in regard to this hotel?

A. No; I never received any direction from the board of directors.

Def't's counsel here moves to strike out the testimony of the witness; no foundation has been shown or authority to the secretary, sup't, or president of the Co. in relation to the hotel matter; that the records of the Co. show nothing in that regard, and that it was not the business of the Co. Motion overruled. Excep-
89 tion noted.

Court here adjourned.

Pl'ffs objected to minutes of Co. that they should show what they contain.

And the defendant, to prove the issues on its behalf, produced as a witness one CROSBY DAWKINS, who, being duly sworn, testified as follows:

Direct examination:

Q. Do you reside in the city of Jacksonville?

A. Yes, sir.

Q. How long have you resided here?

A. 23 years.

Q. What is your business?

A. Insurance.

Q. How long have you been in the insurance business?

A. Six years as principal, two years before.

Q. Do you or not represent a large number of companies?

A. Ten.

Q. How are they scattered? I mean in what parts of the country.

A. By territory—some for the whole State of Florida, some of the city of Jacksonville and vicinity.

Q. I mean as regards the United States.

A. Most of them do business all over the United States.

Q. Do you know this property called the Burnside Beach hotel—Palmetto hotel?

A. I do.

Q. Were you ever applied to for insurance on that hotel; and, if so, by whom?

A. Yes, sir; twice.

90 Q. By whom?

A. Mr. A. Solary.

Q. Who else?

A. My memory is not very distinct. I think I was approached on the subject by Mr. Challen.

Q. Do you remember the times when you were approached on the subject?

A. I know when Mr. Challen approached me; it was between 18 months and two years ago, as near as I can recollect.

Q. Do you know when Mr. Solary, as you think, approached you?

A. No, sir; that is very indistinct.

Q. Anybody else ever approach you?

A. Not that I remember distinctly.

Q. Did you grant insurance?

A. I did not.

Q. State why.

Objected to; reasons are not evidence; facts are.

Q. State what answer you made to the parties as the reason for not granting insurance.

A. He asked me for insurance. I told him I could not do it. He wanted to know why. I told him all insurance companies had the same rule. We did not insure unprofitable property if we had reason to believe it would not be a paying investment. That was the reason particularly in Florida for the last ten years. Hotel properties had been considered unprofitable with insurance companies in this State.

Q. You represented your companies refused to take it at any risk?

A. Yes, sir.

91 Cross-examination:

Q. As I understand you, then, it was on account of the moral risk as much as the financial risk?

A. It was not simply as a hotel. When anything does not make money, it makes no difference, it is without rating.

Q. That is to say, you are afraid if the property was not making money parties will let it burn down?

A. That is the inference.

By the JUDGE: Do I understand you to say that if a tender had been made in your office of a premium of $6,000 or $8,000 a year you would not insure that property?

A. Yes, sir.

Q. You would not?

A. I would not.

Q. Suppose they offered you a premium of $6,000 or $8,000 a year?

A. That is hardly a supposable case.

By the COURT: If that policy for $6,000 had been asked for and a premium of $6,000 per annum offered to be paid, would you have taken that offer?

A. That is hardly a supposable case.

Q. Would you have taken that offer?

A. I am not prepared to say. I tell you now that I will refuse and the companies will refuse. It would create suspicion at once.

By the COURT: There was no premium, then, that anybody could have offered in any way to have induced you to give a policy of $6,000?

A. No, sir.

Q. Was there anything that would have induced you to give a policy for $1,000?

A. No, sir. If I could insure it at all I would not insure it for an amount which my judgment would not dictate.

92 Q. If they had applied to insure in one of your companies for $1,000 and offered you a good, round premium, would you have taken it?

A. No, sir.

By pl'ffs' att'y:

Q. Didn't you take insurance on that property?

A. On the contents.

Q. You insured Mrs. Roberts, did you not?

A. Yes, sir; on furniture.

Q. Who is Mr. Solary? Who did he make the application for?

A. I presume he made it for the railroad company.

Q. You knew he was a director of the company?

A. I did not.

Q. Did he state who he wanted to insure it for?

A. No, sir.

Q. Did you ask him who it was for?

A. No, sir.

Q. You refuse all hotels that do not pay?

A. We try to.

Q. That is the reason?

A. Yes, sir.

Redirect examination:

Q. What other insurance agencies were in this city from Jan'y, 1888, to Jan'y, 1890?

A. In Jan'y, 1888, Geo. R. Foster & Co., Norton, J. S. Ely, and myself. Mr. Ely died in August of that year, during the epidemic, and was succeeded by Clarkson, Robertson & Co., and at present run by J. J. Williams. That is the only change up to date.

Q. In 1888 was there or not an epidemic of yellow fever?

A. Yes, sir.

93 Q. Between what dates?

A. From August 8th up to Dec. 15th.

Q. Did not prevalence of the epidemic make it difficult to obtain insurance on such property?

A. Yes, sir.

And the defendant, to further prove the issues in its behalf, produced as a witness LAWRENCE HAYNES, who, being duly sworn, testified as follows:

Direct examination:

Q. What is your business?

A. Insurance business and general merchandise.

Q. Are you a member of any firm; and, if so, what firm?

A. Foster, Marvin & Haynes.

Q. How long have you been in the insurance business?

A. I have been principal for eleven years and as a clerk 4 or 5 years previously.

Q. You were then in the insurance business in 1887, 1888, & 1889?

A. Yes, sir.

Q. Still in the insurance business?

A. I am.

Q. Do you or your firm represent a number of insurance companies?

A. Yes, sir.

Q. How far does the territory of those insurance companies extend?

A. We represent American companies, who write insurance all over the United States, and foreign companies, who write all over the world.

Q. Did you know the Burnside hotel or Palmetto hotel down at Burnside Beach?

94 A. I know there was such a hotel; I think I took dinner there once.

Q. Were you ever applied to for insurance on that property?

A. Yes, sir; we were applied to on two occasions.

Q. Who by?

A. I really could not say distinctly; I did not tax my memory with it. Of course, I had no interest in the world with it and could nor write the insurance, as I told the parties, for the reason that the companies that we represented do not write summer hotels; they are on their prohibited list.

Q. You didn't know who it was applied to you?

A. I won't be positive; it may have been Mr. Ming and, I think, Mr. Challen—Col. Challen.

Q. In what capacity did Mr. Challen apply to you?

A. Simply for insurance on the hotel.

Q. You refused it?

A. Yes, sir.

Q. As an insurance agent you would not take any risk on that property?

A. No; I could not have done it.

Q. I will ask you, as an insurance agent and having experience in that business, whether any reputable company would have taken—any reputable company who could have been relied on to pay its losses if any occurred—would have taken insurance on it.

A. Well, I cannot say; I am only speaking for the companies that we represented ourselves.

Q. How many did you represent?

A. Seven.

Q. Why is it that you refused insurance on that class of property?

95 A. I imagine that they thought them an unprofitable source of business.

Cross-examination:

Q. Was not that insurance applied for on behalf of the railroad Co.—the Jacksonville, Mayport, Pablo Railway & Navigation Co.?

A. I do not recollect, sir.

Q. Who was Mr. Ming?

A. Mr. Ming was the sup't of the road.

Q. Of the railroad Co.?

A. Yes, sir.

Q. He didn't want insurance for himself, did he?

A. No, sir; I suppose not.

Q. Who did he want to insure it for; who did he represent?

A. I imagine that he wanted to insure it for Mrs. Hooper, although I am not clear at all.

Q. Was he Mrs. Hooper's superintendent?

A. No, sir; he was the railroad superintendent.

Q. Did he apply to you as sup't of the railroad Co. to insure that property?

A. I don't remember.

Q. Did not prevelence of epidemic make it more difficult to obtain insurance on such property?

A. Yes, sir.

The defendant, to further prove the issues in its behalf, produced as a witness J. J. WILLIAMS, who, being duly sworn, testified as follows:

Direct examination:

Q. What business are you in?

A. Insurance.

Q. How long have you been engaged in that business?

A. About three years.

96 Q. Who did you succeed?

A. Clarkson, Robertson & Co.

Q. Who did they succeed?

A. Mr. Ely, I think; Mr. Wyatt acted as agent after Mr. Ely died.

Q. Was or not that during the epidemic?

A. Yes, sir; Clarkson, Robertson & Co. bought the business in 1889.

Q. Do you represent now the office?

A. Yes, sir.

Q. Have you the records of the office, books and papers?

A. Yes, sir.

Q. Have you looked and, if so, do you find upon any of those records any application for insurance of the property known as the Hotel Burnside or Burnside hotel at Burnside Beach?

A. On my books there is no record at all, but there is a tissue copy of the record signed by Mr. Wyatt, which I supposed he sent off, as we generally do, to a wild-cat company to get insurance when good companies would not write them; at least, he did to see if he could get it.

Q. Any record that that was ever granted?

A. No, sir.

Q. Have you got a copy of that (meaning application)?

A. Yes, sir.

Q. Will you produce it?

Witness produces tissue copy.

Defendant, to further prove the issues in its behalf, here offered in evidence the tissue copy purporting to be an application by one Wyatt, insurance agent, who the witness Williams, as insurance agent, was the successor of, as testified to by him, for insurance for Hooper on the property in question to some wild-cat company not having agency in this city. 97

(This tissue copy was burned by the fire. It purported to be an application by Wyatt, ins. agent, to outside Co. for insurance for Hooper on this property,) but the said judge did then and there deliver his opinion and decision that the said tissue was not admissible in evidence; to which ruling and decision of the said judge the defendant, by its attorney, did then and there except. Above ruling made on objection by plaintiffs' counsel.

The defendant, to further prove the issues on its behalf, then offered to prove by the said witness, Williams, the contents of this paper, but the said judge did then and there deliver his opinion and decide that said testimony was not admissible and ought not to be admitted on the part of the defendant, and refused to permit the witness to testify in regard thereto; to which ruling and decision of the said judge the defendant, by its attorney, did then and there except.

The defendant, to further prove the issues in its behalf, introduced F. O. NICHOLS, who, being duly sworn, testified as follows:

Direct examination:

Q. Were you of the firm of Clarkson, Robertson & Co. or connected with them in 1888 and 1889?

A. I had a desk in their office.

Q. Connected with them in business ways?

A. Yes, sir.

Q. They were in the insurance business, were they not?

A. They were in it from Jan'y, 1889.

Q. Did Mr. Wyatt have a desk in the same office?

A. Mr. Wyatt was simply the manager of their insurance
98 department. He conducted the insurance business of Mr.
Ely until his death, and he held that until the 1st of Jan'y, 1889, and he surrendered to Clarkson, Robertson & Co., and moved his office into theirs and followed the business as their manager.

Q. When he ceased to do business and they obtained the insurance business did they turn over to him the records of insurance?

A. Yes, sir.

Q. Those are the same that have been subsequently turned over to Mr. Williams?

A. Yes, sir.

Q. Did Mr. Hooper or any other person apply to that office or come to that office for insurance at any time during those periods or ask for insurance on the Burnside Hotel property?

A. I cannot answer specifically. I know that Mr. Hooper, by his own statement to me, at one time was looking for insurance there. I know he was in there often talking with Wyatt about insurance and Wyatt was making remarks to the effect that insurance could not be had on that property.

Q. Do you know Mr. Wyatt's handwriting?

A. Very well.

Q. Do you know whose handwriting that is (handing witness tissue heretofore ruled out by the court)? In whose handwriting is this paper?

Question overruled and exception noted.

Q. Is not this paper taken from the tissue book on which the original was pressed?

Question overruled. Exception noted.

Q. Is not this paper the tissue record from the records that went into your office-insurance business?

99 Question overruled. Exception noted.

Q. Is not this the usual course in your business of making applications for insurance, to send the written application on and keep the tissue?

Question overruled. Exception noted.

And defendant again offers in evidence the said tissue application, but the said judge then and there delivered his opinion and did decide that the said paper ought not to be admitted, and refused to permit the same in evidence or to be read in evidence on the part of the defendant on the ground, as stated by said judge, that it did not appear to be signed by any one; that it does not appear nor has there been any testimony given, as the court understands it, for certain what has become of the original—the other witness stated he presumed the original was sent away—and because it is shown in the handwriting of a third person not connected with this contract in one way or the other; to which runing of the said judge and refusal to permit the said paper to be read in evidence by the defendant the defendant, by its att'y, did then and there except.

The defendant, to further prove the issues in its behalf, offered in evidence the record book of the defendant company, being the record book of the minutes of the board of directors and stockholders of said company, and, further, to prove that the same was the original minute book as it purported to be, and that it contained all the records of the resolutions of the meetings of the board of directors and stockholders of said company, and that it was required kept by said company; and further offered to prove that the said book of minutes contained nothing authorizing the execution
100 of the alleged contract of lease by the president of its
said company affirmatively or otherwise, or that they recognized the existence of said contract or any interest or connection with the said paper in question or authorized the making of such lease in any way whatsoever.

But to the admission of said matters so offered to be proved and given in evidence the said judge did then and there deliver his opinion and decide that the same were not proper in this case and refused to permit the same to be given in evidence; to which decision and judgment of the said judge the defendant, by its attorney, did then and there except.

Defendant's counsel, to further prove the issues in its behalf, here offered in evidence the by-laws of said company.

(Here insert all that part of the same showing the duties of the president, secretary, and board of directors.) See 4.

101 *By-laws of the Jacksonville, Mayport and Pablo Railway and Navigation Co.*

4.

102 By-laws of the Jacksonville, Mayport and Pablo Railway & Navigation Company.

Be it enacted, and the same is hereby resolved, that the following shall be and become, and the same are hereby made and confirmed as the by-laws of this company.

BY-LAWS.

Article 1.

Board of Directors—On Quorum.

SECTION 1. A board of directors, to consist of 6 stockholders, shall manage the affairs of said company, 4 of whom shall constitute a quorum for the transaction of all business at any and all times.

Officers.

SEC. 2. The officers of said company shall consist of

1. President,
2. Vice-president,
3. Secretary,
4. Treasurer,

who shall be chosen and elected by the board of directors, and shall hold office for the term of one year and until their successors are duly elected and qualified.

Eligibility.

SEC. 3. No person shall be eligible to the office of president or a director of said company who is not a stockholder therein.

President Must Own 40 Shares of Stock.

SEC. 4. Hereafter no person shall be elected to the office of president unless he shall be a stockholder to the extent of holding in his individual capacity 40 shares of stock in said company, and shall reside and have his office in the city of Jacksonville, Florida.

103 *Office of Secretary and Treasurer May be Filled by One Person.*

SEC. 5. The office of secretary and treasurer may, in the discretion of the board of directors, at any and all times be merged in, held, and the duties of each of said separate offices discharged by one person, who shall, in such case, be denominated the secretary and treasurer of said company.

Annual Meeting of Stockholders.

SEC. 6. There shall be an annual meeting of the stockholders of said company on the 2nd Monday in February in each and every year hereafter, at which meeting 6 directors shall be elected who shall be and constitute the board of directors of said company; a general statement and report of the affairs of said company shall be had, and the transaction of such other business as may be deemed necessary or advisable; such annual meeting to be called by public notices, stating the time and place of such meeting. A majority of the stock represented at any stockholders' meeting shall constitute a quorum for the transaction of all business.

Notice of annual meeting.

Quorum.

Certificate of Stock Must be Produced if Required.

Sec. 7. At any such stockholders' meeting any stockholder shall have the right to call for the production of the stock certificate of any member present or voting at such meeting.

Election of Directors.

Sec. 8. The board of directors shall be chosen and elected at the annual stockholders' meeting of said company aforesaid, such election to be by ballot, and any stockholder receiving a majority of the votes of the stockholders voting at such meeting shall be deemed and declared to be elected (each stockholder to be entitled to one vote for every share of stock owned or controlled by him)
104 as a director of said company. Notice of such annual meeting shall be published in a newspaper published in the city of Jacksonville, Florida, for the space of 20 days previous to the date of such meeting.

Notice of annual meeting.

Corporate Seal.

Sec. 9. The company shall have a corporate seal which shall be affixed to all writings and documents requiring the same, and the secretary shall be the custodian thereof.

Annual Meetings.

Sec. 10. If for any reason such annual meeting should fail to be called or held at the appointed time as herein provided, it shall be called and held thereafter as soon as practicable, and upon twenty days' notice, published as aforesaid; and such meeting so held shall be and become the annual meeting of said company. Such meeting may be called by a majority of the stockholders holding a majority of the stock, or by a majority of the directors of said company.

Special Meeting of Stockholders.

Sec. 11. A special meeting of the stockholders of the company may be called at any time as hereinafter provided, at which special meeting only such business as the same was called for shall be transacted.

Sec. 12. The board of directors, at any election for officers shall have power to omit the election of a vice-president if they, in their judgment, deem such for the best interest of the company, and in such case the office of vice-president shall be deemed abolished for the time boing, and until, in their judgment, it is deemed advisable to revive and fill the same.

Inspectors.

Sec. 13. The board shall, at their regular meeting previous to the holding of any annual or any other meeting of the stockholders of said company at which an election for directors is to be held, appoint any two stockholders of said company to manage and conduct said election held or to be held thereat.

Article 2.

Duties of Officers.

105 Sec. 1. The president shall preside at all meetings of the board of directors and of the company, (of which he shall be president) and shall have the general management and supervision of the operation of the lines of road of said company and the general business thereof; subject. however, at all times, to the control of the board of directors. He shall, when so directed and empowered by the board of directors, execute and sign for and on behalf of said company all documents and writings authorized to be made and executed for and on its behalf. He shall draw and issue all warrants for the payment of monies on the treasurer of said company when so ordered by the board, and sign the same. He shall make an annual report to said company of the condition thereof, with such suggestions and recommendations as he may deem proper, and to said board of directors whenever required by them; and shall do and perform such other duties as are consistent with said office, and others of a like nature, pertaining thereto.

Duties of the Vice-President.

Sec. 2. The vice-president shall, in case of absence or sickness of the president, take his place and perform all the duties of the office of president and be vested with and entitled to the rights and privileges of the president.

Duties of the Secretary.

Sec. 3. The secretary shall well and truly keep, in a set of books provided for that purpose, the minutes of all meetings, both of the board of directors and stockholders, and shall at all times attend upon said board of directors and the meetings of said company for that purpose; shall keep and file all papers, deeds, bonds, accounts, vouchers and receipts and papers of said company given into his keeping in a safe place; shall keep, in a set of books provided for that purpose, all the accounts and transactions of said company, which shall show the earnings and expenses of same, and all other matters of a like nature; shall make a monthly statement thereof to the board of directors, or oftener if required by them, and an annual statement to the annual meeting of the company. He shall keep the stock books of said company, and enter therein all the stocks sold, to whom, at what date, the amount or number of 106 shares and the amount paid in on the same, and any sales or transfers thereof. He shall, under the direction of the board, issue certificates of stock to the person or persons entitled thereto. He shall countersign all warrants issued by the president on the treasurer for the payment of all monies and affix the seal of the company thereto, entering the same in books kept for that purpose, and shall countersign and attest all writings and documents on behalf of said company and affix the corporate seal thereto as authorized by the board of directors, and shall further do and perform all other duties and things necessary and pertaining to offices of like nature or required by the board of directors.

Duties of the Treasurer.

SEC. 4. The treasurer shall well and truly keep, in a book provided for that purpose, the accounts of said company, showing all monies and securities received by him, and all disbursements and payments for and on behalf of said company. He shall give bond for the faithful performance of all duties, the payment and delivery of all monies and securities received by him or coming into his hands in the sum of $5,000, which bond shall be approved by the board of directors and filed with the secretary. He shall pay no monies except on the written order of the president, countersigned by the secretary, which voucher he shall keep and retain as his authority for such payment, rendering monthly statements of all such warrants paid, so that the secretary may note the same on his books. He shall make an annual statement to said company of the affairs of his office, and a monthly statement to the board of directors, or oftener if so required by them; and shall well and truly do and perform all other duties, matters and things necessary and pertaining to such offices or offices of a like nature.

The Board of Directors.

SEC. 5. The board of directors shall manage all the affairs of said company, and at all times direct and control the same, having supervision and control over all the departments thereof. They shall meet regularly at their office in the city of Jacksonville, or at such other place as they may designate, on the first Tuesday of each and every month in each year after their organization as herein provided, for the transaction of all business which they shall
107 deem requisite. On the 2nd Tuesday of February in each and every year hereafter, after the annual meeting of the company, or, in case such annual meeting is not held on the day provided therefor in these by-laws, on the day next succeeding the holding of the stockholders' meeting called ther-for, as provided in article I, section 10 of these by-laws, the directors so elected at such meeting shall assemble and organize as the board of directors of said company, and shall at such meeting choose and elect a president, vice-president, secretary and treasurer, except as herein otherwise provided, which officers so elected shall be the officers of said company for the term of one year therein next ensuing, and until their successors are elected and qualified.

Elections.

SEC. 6. Such elections shall be by ballot, and the person receiving a majority of the votes cast at such election for any such office shall be declared duly elected thereto.

Elections.

SEC. 7. If from any cause the board of directors should fail to meet and hold such election at the time appointed, as above provided, they shall meet and hold the same as soon as practicable, and within thirty days thereafter. They shall fill all vacancies in any of the offices of the company and said board of directors caused by death, sickness, absence or inability on the part of the incumbent of such office to perform the duties thereof, either temporarily or for the full unexpired term of such office, and until a successor is duly elected and qualified. They shall have power, by a two-thirds vote of their body, to suspend or remove any officer of the company for malfeasance or misfeasance in office, and to fill the vacancy occasioned thereby; to call at all times for statements and accounts from all the officers and departments of the company; to inspect all books, records and accounts thereof; to make rates for the carriage of passengers and property over its lines of road; to enter into contracts or authorize the same to be made and entered into by any one of the officers of said company, or other persons by, for and on its behalf, as they shall deem best for the interest of said company; to ratify and confirm the same, and any and all acts of its own, its agents, officers, attorneys, servants and employees, 108 or, for proper cause and reasons, to reject and refuse so to do; to employ permanent counsel to represent and advise them and said company; to authorize its president to execute and sign all writings and instruments to be executed and signed for and in behalf of said company, and to have affixed the corporate seal thereto; to contract for the purchase of any lands for the right of way or ways for the lines of its roads, or otherwise, or for such purpose as they may deem proper, and to purchase and buy the same for and in behalf of said company; to sell the lands belonging to said company, purchased by or granted to it, and to convey the same to the purchaser thereof, or authorize it to be done, and to have the same platted into lots, blocks and streets; to direct and prescribe the location of the lines of its roads; to have power to let all contracts for the building of its lines of roadway, or any part thereof, or altering or repairing the same, and the erection of such depots, stations, bridges, crossings, fences or other buildings, as they may deem requisite and desirable for the interest of said company. They shall, at their regular monthly meetings in each month, audit and pass all accounts, authorize the inspection of all work done and order the payment of all monies therefor or to be paid by said company, and authorize the president to issue his warrant on the treasurer therefor, to be countersigned by the secretary, as herein provided. They shall have the power to call a special meeting of the stockholders of said company, as hereinbefore provided, at any time that they may deem it advisable and necessary so to do; provided, that, in addition to the notice to be published, as in other cases herein provided, a personal notice of such meeting, containing the time, place and purpose of same, be mailed by the secretary to the address of each stockholder of said company, as the same appears

from his books. They shall prescribe the manner in which and when the stock books of said company may be opened for the sale of stock, and how the same may be sold, at what price per share, and how much shall be paid thereon at any sale thereof; to prescribe the manner in which and when the stockholders of said company shall pay the amount of stock by them variously subscribed, and in such instalments as they may deem proper; to declare all stock and previous payments therein forfeited when the
109 holders thereof shall not have complied with the calls made thereon and the resolutions of said directors as provided by statute.

The board shall have power to alter or amend these by-laws or prescribe and enact such further and other by-laws as they may deem necessary, by a vote of two-thirds of their body in regular session, and shall have power to further do and perform all other matters and things proper and necessary to be had, done or performed for or on behalf of said. company, and as to them, in their judgment shall seem best for the welfare and interest of the same, whether herein specified or not, as given under the statutes in such case made and provided.

Article III.

Transfer of Stock.

SEC. 1. The stock of said company, and the certificates representing the same may be transferred by the owner thereof by writing his or her name across the face or other part thereof, but no such assignment shall be valid or binding on said company unless and until all previous calls thereon shall have been fully paid in, and until such transfer shall have been reported to the secretary of said company, and the same noted on the books thereof.

Location of Offices.

SEC. 2. The general offices of said company shall be in the city of Jacksonville, but the company may have such other offices as they may deem proper, and as are necessary for the transaction of its business.

Amendments.

SEC. 3. These by-laws may not be altered, amended, added to or changed in any way or manner whatsoever except by a vote of two-thirds of the board of directors at any regular meeting of the same, or by a two-thirds vote of the stockholders of said company at any annual meeting thereof present and voting for the same, and not then unless the proposed alteration, amendment or addition shall have been reduced to writing and forwarded to the secretary one month previous to any regular meeting of the board of directors or such annual meeting of the company as herein provided.

A. SOLARY, *President.*

C. F. WARRINER, *Secretary.*

[CORPORATE SEAL.]

Elections.

SEC. 7. If from any cause the board of directors should fail to meet and hold such election at the time appointed, as above provided, they shall meet and hold the same as soon as practicable, and within thirty days thereafter. They shall fill all vacancies in any of the offices of the company and said board of directors caused by death, sickness, absence or inability on the part of the incumbent of such office to perform the duties thereof, either temporarily or for the full unexpired term of such office, and until a successor is duly elected and qualified. They shall have power, by a two-thirds vote of their body, to suspend or remove any officer of the company for malfeasance or misfeasance in office, and to fill the vacancy occasioned thereby; to call at all times for statements and accounts from all the officers and departments of the company; to inspect all books, records and accounts thereof; to make rates for the carriage of passengers and property over its lines of road; to enter into contracts or authorize the same to be made and entered into by any one of the officers of said company, or other persons by, for and on its behalf, as they shall deem best for the interest of said company; to ratify and confirm the same, and any and all acts of its
own, its agents, officers, attorneys, servants and employees,
108 or, for proper cause and reasons, to reject and refuse so to do;
to employ permanent counsel to represent and advise them and said company; to authorize its president to execute and sign all writings and instruments to be executed and signed for and in behalf of said company, and to have affixed the corporate seal thereto; to contract for the purchase of any lands for the right of way or ways for the lines of its roads, or otherwise, or for such purpose as they may deem proper, and to purchase and buy the same for and in behalf of said company; to sell the lands belonging to said company, purchased by or granted to it, and to convey the same to the purchaser thereof, or authorize it to be done, and to have the same platted into lots, blocks and streets; to direct and prescribe the location of the lines of its roads; to have power to let all contracts for the building of its lines of roadway, or any part thereof, or altering or repairing the same, and the erection of such depots, stations, bridges, crossings, fences or other buildings, as they may deem requisite and desirable for the interest of said company. They shall, at their regular monthly meetings in each month, audit and pass all accounts, authorize the inspection of all work done and order the payment of all monies therefor or to be paid by said company, and authorize the president to issue his warrant on the treasurer therefor, to be countersigned by the secretary, as herein provided. They shall have the power to call a special meeting of the stockholders of said company, as hereinbefore provided, at any time that they may deem it advisable and necessary so to do; provided, that, in addition to the notice to be published, as in other cases herein provided, a personal notice of such meeting, containing the time, place and purpose of same, be mailed by the secretary to the address of each stockholder of said company, as the same appears

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stock and previous payments therein forfeited when the
109 holders thereof shall not have complied with the calls made
thereon and the resolutions of said directors as provided by
statute.

The board shall have power to alter or amend these by-laws or prescribe and enact such further and other by-laws as they may deem necessary, by a vote of two-thirds of their body in regular session, and shall have power to further do and perform all other matters and things proper and necessary to be had, done or performed for or on behalf of said company, and as to them, in their judgment shall seem best for the welfare and interest of the same, whether herein specified or not, as given under the statutes in such case made and provided.

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A. SOLARY, *President.*

C. F. WARRINER, *Secretary.*

[CORPORATE SEAL.]

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own, its agents, officers, attorneys, servants and employees,
108 or, for proper cause and reasons, to reject and refuse so to do;
to employ permanent counsel to represent and advise them and said company; to authorize its president to execute and sign all writings and instruments to be executed and signed for and in behalf of said company, and to have affixed the corporate seal thereto; to contract for the purchase of any lands for the right of way or ways for the lines of its roads, or otherwise, or for such purpose as they may deem proper, and to purchase and buy the same for and in behalf of said company; to sell the lands belonging to said company, purchased by or granted to it, and to convey the same to the purchaser thereof, or authorize it to be done, and to have the same platted into lots, blocks and streets; to direct and prescribe the location of the lines of its roads; to have power to let all contracts for the building of its lines of roadway, or any part thereof, or altering or repairing the same, and the erection of such depots, stations, bridges, crossings, fences or other buildings, as they may deem requisite and desirable for the interest of said company. They shall, at their regular monthly meetings in each month, audit and pass all accounts, authorize the inspection of all work done and order the payment of all monies therefor or to be paid by said company, and authorize the president to issue his warrant on the treasurer therefor, to be countersigned by the secretary, as herein provided. They shall have the power to call a special meeting of the stockholders of said company, as hereinbefore provided, at any time that they may deem it advisable and necessary so to do; provided, that, in addition to the notice to be published, as in other cases herein provided, a personal notice of such meeting, containing the time, place and purpose of same, be mailed by the secretary to the address of each stockholder of said company, as the same appears

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stock and previous payments therein forfeited when the
109 holders thereof shall not have complied with the calls made
thereon and the resolutions of said directors as provided by statute.

The board shall have power to alter or amend these by-laws or prescribe and enact such further and other by-laws as they may deem necessary, by a vote of two-thirds of their body in regular session, and shall have power to further do and perform all other matters and things proper and necessary to be had, done or performed for or on behalf of said company, and as to them, in their judgment shall seem best for the welfare and interest of the same, whether herein specified or not, as given under the statutes in such case made and provided.

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A. SOLARY, *President.*

C. F. WARRINER, *Secretary.*

[CORPORATE SEAL.]

110 to show the duties of the president, the board of directors, and of the secretary, and to show further under these by-laws that no contract could be executed in writing for — on behalf of the company unless by express direction of the board of directors, and that it could not be valid and binding under the said by-laws unless the corporate seal of the company was directed by them to be affixed thereto, and that the secretary had been by them directed to use the same, and the corporate seal of the said company was affixed thereto and it was tested by the said company, and to show that the board of directors abrogated to themselves by said by-laws the sole authority and power to make any such contract.

But to the admission in evidence of the said by-laws, so offered to be proven and given in evidence, plaintiffs' counsel objected on ground that the said by-laws as they appear are not in proper form to be offered in evidence; that it is not the original or certified copy; that it is a printed book and comes here with no authentication, and, in addition to that, we ask the court to charge, unless the knowledge contained in said by-laws was brought immediately to the parties plaintiff to this contract, that they, the plaintiffs, cannot be bound by anything in any paper of that kind (meaning the said by-laws).

And the said judge then and there delivered his opinion and did decide that the objection of the plaintiffs' counsel was well taken and sustained the same and refused to permit the said matters so offered to be proven and given in evidence, and he refused to permit the said by-laws in evidence; to which ruling and decision of the said judge the defendant, by its attorney, did then and there except.

The defendant, to further prove the issues in its behalf, called to the stand H. H. BUCKMAN, who, being duly sworn, testified
111 as follows:

I was the att'y for the railroad company from its beginning, except the drawing of its charter, which was done by Col. Bisbee. I drew those by-laws at the request of the company. The manuscript from which they were printed was destroyed after it came out of the printer's hands for the reason that it was mutilated and torn. The company have acted on these by-laws up to date and they have never been changed in any manner or respect or amended except by the reduction of one of the number of directors—when he died the number was reduced to five—and one other change in the date of the meeting of the board of directors. Those are the by-laws of the company as they exist today.

The defendant here offered again in evidence, to further prove the issues in its behalf, the said by-laws for the purposes aforesaid; but to the admission of the said by-laws and the said matters so offered to be proven and given in evidence the said judge then and there delivered his opinion and decided that the said matters so offered to be proven and given in evidence by the defendant—that the said by-laws should not be admitted in evidence and refused to admit the same; to which ruling and decision of the said judge the defendant, by its attorney, did then and there except.

And the defendant, to further prove the issues in its behalf, produced as a witness H. H. BUCKMAN, who, being duly sworn, testified as follows:

At the time of the drawing of this instrument (referring to the alleged lease) personally I was not the att'y of Mrs. Hooper or Mr. Hooper. I drew that paper simply in a clerical capacity, having no knowledge of my own as to what should be done with it.

112 Cross-examination:

Q. Did you draw up that lease?
A. I dictated it to my stenographer.
Q. As att'y for the company?
A. I cannot say that; it was not brought to me, neither by Capt. Wallace or Mr. Hooper.
Q. Who brought it to you?
A. That is a question I refuse to answer, because it is a priviledged question. I do it because Capt. Wallace is dead, and as his private att'y, as well as att'y for the railroad, I am obliged to keep the secrets of it.
Q. You refuse to tell me who brought that paper to you?
A. Yes, sir.
Q. You drew it up as an att'y?
A. I did.
Q. And you intended to bind Mr. & Mrs. Hooper?
A. I intended what the paper means.
Q. You did not draw it up as waste paper?
A. I cannot say anything but what the paper shows.
Q. You gave one copy to Mrs. Hooper and one copy to Mr. Wallace?
A. My best recollection is that Capt. Wallace and Mr. Hooper were both in my office at the time they signed that paper, and signed it in my presence. Mrs. Hooper was out of the State. I turned the paper over to Capt. Wallace in Mr. Hooper's presence, or it may have been to Mr. Hooper to be sent to Mrs. Hooper, as she was *was* not here.
Q. You didn't give one to Capt. Wallace?
A. I have no recollection of any but that one paper, because it is my custom in my business when a duplicate copy is made 113 to make the papers read duplicate originals; thus the paper would read, "Witness our hands and seals in duplicate."
Q. Did you see that original lease in Mr. Ming's office not long ago while he was sup't of the road?
A. No, sir.
Q. Did you tell Mr. Warriner the other day that you had seen that lease?
A. No.

Q. Didn't Mr. Warriner tell you you had seen that lease in that office?

A. No, sir.

Q. Didn't he tell you it had the seal of the office on it?

A. No, sir; and most emphatically it did not.

Q. You did not see that lease in the office of Mr. Ming, the sup't of the road?

A. Never to my recollection.

Q. Don't you remember if you had?

A. Yes; but I don't remember ever seeing it.

Q. Did you ever have any conversation with Mr. Ming on the subject?

A. Not since the lease was signed.

Q. That paper came from your office, didn't it—that is, one of your wrappers and papers—all the way through?

A. That paper is the original paper that was signed in my office; it has the endorsement of my clerk.

Q. Was there not a company seal at the time that lease was executed?

A. There was a company seal in existence and in the custody of Mr. Warriner, secretary, as the by-laws provided.

114 Q. You say you do not know that seal was put on the lease?

A. I do not know; I do not believe it ever was. That is (referring to the paper just filed) the original and the only original I know about. If the seal had ever been on it, it never could be erased, because it was a stamp.

Q. Who paid for drawing up that paper?

A. I never was paid for it.

Q. Did you enter it up in any accounts anywhere?

A. Yes; charged it to Capt. Wallace.

Q. Did you enter it up in any account against Mr. Hooper?

A. No, sir; had no reason; was not acting for Mr. Hooper in any capacity; refused to do business for him.

And the plaintiff- here offers in evidence, to prove the issues on their part, the paper-writing purporting to be a lease between the parties hereto, which is the same first offered and objected to in this case and testified to by the first two witnesses, but which plaintiffs afterwards substituted by introducing, under the decision of the said judge, what purported to be a certified copy, and here states that he offers this paper in evidence to show that it never had been recorded, and the defendant, by its att'y, did then and there object to its introduction in evidence for any purpose on the ground that it is not the contract of this defendant company; that it has not the corporate seal on it, nor is it shown to have been executed by any authority or with the knowledge of the said company.

But the said judge then and there delivered his opinion and decision and did decide that the objections of the said defendant were not well taken and overruled the same and admitted the said 115 paper in evidence and to be read in evidence; to which ruling and decision of the said judge and the admission of the said paper in evidence said defendant, by its att'y, did then and there except.

And the said judge, the said parties having concluded and submitted their testimony and the several matters aforesaid, did then and there deliver his opinion and deliver his charge to the jury:

GENTLEMEN OF THE JURY: This is an action by Mary J. Hooper and Henry H. Hooper, her husband, and William F. Porter, for the use of Mary J. Hooper, against the Jacksonville, Mayport, Pablo Railway & Navigation Company. As you are already aware, the claim of the plaintiffs is founded upon a contract which has been signed, as has been shown you, by William F. Porter and by H. H. Hooper, Jr., att'y-in-fact, by H. H. Hooper, Jr., and by Mary J. Hooper, and also signed by the Jacksonville, Mayport, Pablo Railway & Navigation Company and sealed by Alexander Wallace, president, as appears by this copy of the contract, which is stated to be, and I believe is established to be, a certified copy of what was put of record in the matter.

To all of which charge and the matters thereof defendant, by its att'y, then and there excepted on the ground that said judge therein and thereby charged the said jury that the said paper-writing, the foundation of this suit, was a contract; that the same had been signed or been shown to the *the* jury to have been signed by the defendant company; that the same appeared by the certified copy to be a contract or to have been signed by the said defendant company; because the said certified copy had no seal or copy of a seal of the defendant company upon it; because the same only contained a copy of the private seal of Alexander Wallace, being
116 made by a scrawl with the words seal written within it.

And the said judge, continuing to charge the said jury, further charged them:

Another copy of the contract, claiming to be a duplicate copy, has also been put in evidence and read to you, and there has been considerable legal question about these papers. I shall say to the jury that in the opinion of the court these contracts were the contracts of the defendant railroad company, and that they bind the company. I charge you, gentlemen of the jury, that these contracts or this is the contract of the defendant company and the company were bound by it.

To all of which portion of said charge the defendant, by its attorney, did then and there except on the ground that said judge then and thereby charged the said jury that these contracts (meaning the certified copy and the original called an original duplicate) were contracts; because the said judge charged that they were contracts binding upon the defendant company; because the said judge charged that these contracts or the contract in question was the contract of the defendant company and bound it; because the said original duplicate contained no seal of the said company, nor was it attested by the secretary thereof.

And the said judge, continuing to charge the said jury, further charged them:

"That being the case, there are but two questions left for you to settle under this paper: First, was it possible to insure that hotel at any time after the signing of this contract and before the fire, under any circumstances, by the payment of any premium whatever. If it was they were bound to do it, and if they could do it and did not do it they are liable for the damages that occurred by
117 not doing it. Not would it be expedient or a difficult thing to do, but could it have been done at all by anybody anywhere. It is the defendants' business in this case, it is their duty, to satisfy you that they were unable to do it. It was with the view of getting one of the witnesses' ideas upon this subject thoroughly and fully that I asked the question, peculiar question, that I did. The answer was, as far as that witness is concerned, that under no circumstances, by the payment of any premium, would any company that he had anything to do with insure this property for any person. You are to determine, and it is for you to determine—it is part of your duty in this case, and one of the principal duties which you have to perform in this case—to say whether the defendants have satisfied you that it was absolutely impossible to insure this property. If it was, then they could not do an impossible thing, and the plaintiff cannot recover in this case. If they have not so satisfied you of that fact and you believe that it was possible from the evidence, that it was possible at all—and I put this broadly because the law, in my judgment, is as broad as that—if it was possible at all to carry out the agreement which the company made with the owners of the property to insure for $6,000, and they did not do it, then they are liable for not doing it. Its liability in this instance depends upon whether it was possible or not. If you find that it was not possible, you must find your verdict for the defendant company, and that will be an end of the consideration of the case."

To all of which portion of said charge the defendant, by its attorney, did then and there except, on the ground that the said judge then and there charged the said jury that if it was possible for the defendant to have insured the said premises in question under
118 any circumstances and by the payment of any premium whatever, the company was bound; because said judge presupposed and prejudged the existence of a contract on the part of the defendant; because the said judge charged that if the defendant failed to obtain insurance under any circumstances, by the payment of any premium whatever, that it was liable for the damages that occurred for not doing it; because the judge charged that the defendant was liable for all damages that occurred by failure to insure the property; because the said judge charged that the defendant must show that it could not have insured at all, by anybody or anywhere; because the said judge by said charge required the jury to find that the defendant had to accomplish an impossibility—*i. e.*, that the defendant had to apply to every insurance company in the world and offer every inducement and premium to obtain such insurance; because said charge is not applicable to the evidence and pleadings in said cause, in that damages were only claimed up to the amount of the value of the building at the time it was burned, whereas said judge

left to the discretion, improperly, of the jury to find any amount of damages up to the amount of the alleged covenant.

And the said judge, continuing to charge the said jury, further charged them:

"If you find from the evidence that it was possible to insure this property at all, then there will be another question: How much were the owners of the property damaged by their failing to do so? and under that head you come to the consideration of the different testimony, the various testimony given as to the value of the property. I would say to you, as to the testimony, you are not bound by any man's testimony. You may take it all if you believe it, you may take part of it, or you are entitled to reject it all. If 119 you agree with one man and disagree with ten others, you may find a verdict upon the testimony of one and against the testimony of ten. If ten men testify to a state of facts which you do not believe and which is absurd and impracticable, you are not bound to find a verdict by it. I do not intend to say much about the value of this property, except that it ran all the way from $3,150 to $8,000; I am not sure but one witness put it at $10,000. You heard the size of the house, 40 x 50, three stories high, with an attic on top of the same, forty-odd rooms, I believe—I do not remember exactly—and the first three stories plastered, and a piazza around three sides. The particulars about each little item is not important, but the general size of the house. Most of you know, most of you own a house, or you may have had one built, and from that experience and knowledge you will be able to say, upon the testimony given, whether a house 40 x 50, four stories high, with 40 odd rooms, would cost 3,150, $3,800, $6,000, $8,000, or $10,000, and from that experience and knowledge you will weigh the testimony as given from the stand and come to a conclusion you should under your oaths as to the probable value of the property, and which witness, under the circumstances, is likely to be correct, whose judgment in the matter was likely to be correct. If a man should come and tell you that the house in which you reside, with ten rooms, that he would build it for $10,000, and another one should tell you it would cost $4,000, you would know, in your judgment, which one was correct; so you will do with the witnesses in this case; you will measure their testimony by your judgment and experience and bring in your verdict accordingly. If you find the company was liable under the first charge, if you find they could insure the property, then you will find a verdict for the plaintiff what the property is worth, up to $6,106.67."

120 To all of which portion of said charge defendant, by its attorney, did then and there except, on the ground because the said charge tended to prejudice the jury against the testimony offered by the defendant, in that said judge then and there charged the said jury that if ten men testified to a state of facts *and* which *were* absurd and impracticable, that they were not bound to find a verdict by it; because the said judge in and by said charge took away from the jury the actual consideration of the testimony in said case as to the value of the premises and left it to the individual

experience of the jurors as to what they would consider the value of the premises, as the said judge charged the jury that they could measure the testimony of the witnesses by their experience in the matter of house-building and find a verdict in accordance with their experience instead of according to the evidence given from the stand; because the said judge charged the said jury that if they found the defendant was liable under the first charge and found that defendant could insure the property, namely, could insure it anywhere and for any premium whatsoever, then that they would find a verdict for the plaintiff what the property was worth, up to $6,106.67.

And the said judge, continuing to charge the said jury, further charged them:

"The question of rent, gentlemen of the jury, is one for you to determine; the lease shows rent due, unless the defendant shows part of it paid. They only claim $106.67 rent and interest from Dec. 5th, 1889. If you find for the defendant, your verdict will simply be, We find for the defendant; if you find for the plaintiff, We, the jury, find for the plaintiff, assessing the damages for whatever you find them to be, adding the interest to it from Dec. 5th, 1889."

121 To all of which portion of said charge defendant, by its attorney, did then and there except, on the ground that said judge did then and there charge the said jury that the burden of proof was on the defendant to show that the rent was paid; because the said charge presupposed the existence of a contract binding the defendant for the payment of any rent; because the said judge presupposed and prejudged that rent was due from the defendant; because the said charge was totally inapplicable, as there was no evidence offered by the plaintiff under the claim in his declaration that any rent was due, nor was any evidence offered in regard to rent; because the said judge instructed the jury that they should find and add interest to any amount they found the defendant liable from Dec. 5th, 1889.

Defendant, for the reasons aforesaid, then and there, before the said jury retired from their box and in open court, to the delivery of said charge excepted as aforesaid to said charge by said judge to the jury and every part thereof, and said exceptions were allowed and noted by the said judge at the time.

And the defendant, still insisting upon the said exceptions to the said charge, asked the said judge to charge the jury as follows:

1st. That the board of directors of the defendant company was the sole power and body under the law authorized to make the alleged contract sued on, or authorize the same to be made, and unless the jury find from the evidence that the board of directors of the defendant company had made or authorized the making of said alleged contract, then that the same did not bind said company.

Said judge did then and there deliver his opinion and decision and decide that said charge ought not to be given to the said jury and refused to give the same, and to which refusal and this 122 ruling and decision thereon said defendant then and there, in open court, as aforesaid, excepted.

2nd. And the said defendant, by its attorney, further asked the said judge to charge the jury as follows: If the jury believe from the evidence that the plaintiffs or any of them knew that the property at the time of the making of the alleged contract was not insurable and did not notify the alleged lessees of the fact, then plaintiffs acted in bad faith and they could not recover.

The said judge, then and there delivering his opinion and decision, did decide that said charge should not be given in evidence to the said jury and refused to give the same; to which said refusal of the said judge and his ruling and decision defendant then and there did except.

3rd. The defendant further asked the judge to charge: If the jury believe from the evidence that the plaintiffs or any person on their behalf, before the making of the said alleged contract, tried to get insurance on said property in question and insurance had been refused, and they knowing the same did not so notify the alleged lessees, then the plaintiffs acted in bad faith and they could not recover.

But the said judge, then and there delivering his opinion and decision, did decide that said charge ought not to be given to the said jury and refused to charge the same; to which decision and ruling of the said judge and his refusal to give the said charge the defendant, by its attorney, did then and there except.

4th. And the said defendant, by its attorney, further asked the said judge to charge the jury that if the jury believed from the evidence that insurance on the property in question was sought to be
obtained at the usual places where such insurance would be
123 applied for, and such agencies applied to, representing com-
panies insuring property in all parts of the United States,
refused to insure the property on the ground that such property was not insurable and insurance companies would not insure such classes of property, then any covenant or agreement to insure was impossible of performance and plaintiffs cannot recover.

But the said judge, then and there delivering his opinion and decision, did decide that said charge ought not to be given to the said jury and refused to give the same; to which ruling and decision of the said judge and refusal to give the same defendant, by its attorney, did then and there except.

6th. And the defendant, by its attorney, further asked the said judge to charge the jury that all persons dealing with a special agent were bound to take notice of the authority by which the agent acts, and if the agent acts without the scope of his authority such acts will not bind the company.

But the said judge, then and there delivering his opinion and decision, did decide said charge ought not to be given to said jury and refused to give the same; to which ruling and decision of the said judge and his refusal to give said charge defendant, by its attorney, did then and there except.

And the said judge, under the charge and with the directions aforesaid, submitted the said issue and the evidence so given on the said experience of the jurors as to what they would consider the value of the premises, as the said judge charged the jury that they could measure the testimony of the witnesses by their experience in the matter of house-building and find a verdict in accordance with their experience instead of according to the evidence given from the stand; because the said judge charged the said jury that if they found the defendant was liable under the first charge and found that defendant could insure the property, namely, could insure it anywhere and for any premium whatsoever, then that they would find a verdict for the plaintiff what the property was worth, up to $6,106.67.

And the said judge, continuing to charge the said jury, further charged them:

"The question of rent, gentlemen of the jury, is one for you to determine; the lease shows rent due, unless the defendant shows part of it paid. They only claim $106.67 rent and interest from Dec. 5th, 1889. If you find for the defendant, your verdict will simply be, We find for the defendant; if you find for the plaintiff, We, the jury, find for the plaintiff, assessing the damages for whatever you find them to be, adding the interest to it from Dec. 5th, 1889."

121 To all of which portion of said charge defendant, by its attorney, did then and there except, on the ground that said judge did then and there charge the said jury that the burden of proof was on the defendant to show that the rent was paid; because the said charge presupposed the existence of a contract binding the defendant for the payment of any rent; because the said judge presupposed and prejudged that rent was due from the defendant; because the said charge was totally inapplicable, as there was no evidence offered by the plaintiff under the claim in his declaration that any rent was due, nor was any evidence offered in regard to rent; because the said judge instructed the jury that they should find and add interest to any amount they found the defendant liable from Dec. 5th, 1889.

Defendant, for the reasons aforesaid, then and there, before the said jury retired from their box and in open court, to the delivery of said charge excepted as aforesaid to said charge by said judge to the jury and every part thereof, and said exceptions were allowed and noted by the said judge at the time.

And the defendant, still insisting upon the said exceptions to the said charge, asked the said judge to charge the jury as follows:

1st. That the board of directors of the defendant company was the sole power and body under the law authorized to make the alleged contract sued on, or authorize the same to be made, and unless the jury find from the evidence that the board of directors of the defendant company had made or authorized the making of said alleged contract, then that the same did not bind said company.

Said judge did then and there deliver his opinion and decision and decide that said charge ought not to be given to the said jury and refused to give the same, and to which refusal and this
122 ruling and decision thereon said defendant then and there, in open court, as aforesaid, excepted.

2nd. And the said defendant, by its attorney, further asked the said judge to charge the jury as follows: If the jury believe from the evidence that the plaintiffs or any of them knew that the property at the time of the making of the alleged contract was not insurable and did not notify the alleged lessees of the fact, then plaintiffs acted in bad faith and they could not recover.

The said judge, then and there delivering his opinion and decision, did decide that said charge should not be given in evidence to the said jury and refused to give the same; to which said refusal of the said judge and his ruling and decision defendant then and there did except.

3rd. The defendant further asked the judge to charge: If the jury believe from the evidence that the plaintiffs or any person on their behalf, before the making of the said alleged contract, tried to get insurance on said property in question and insurance had been refused, and they knowing the same did not so notify the alleged lessees, then the plaintiffs acted in bad faith and they could not recover.

But the said judge, then and there delivering his opinion and decision, did decide that said charge ought not to be given to the said jury and refused to charge the same; to which decision and ruling of the said judge and his refusal to give the said charge the defendant, by its attorney, did then and there except.

4th. And the said defendant, by its attorney, further asked the
said judge to charge the jury that if the jury believed from the
evidence that insurance on the property in question was sought to be
obtained at the usual places where such insurance would be
123 applied for, and such agencies applied to, representing com-
panies insuring property in all parts of the United States,
refused to insure the property on the ground that such property was not insurable and insurance companies would not insure such classes of property, then any covenant or agreement to insure was impossible of performance and plaintiffs cannot recover.

But the said judge, then and there delivering his opinion and decision, did decide that said charge ought not to be given to the said jury and refused to give the same; to which ruling and decision of the said judge and refusal to give the same defendant, by its attorney, did then and there except.

6th. And the defendant, by its attorney, further asked the said judge to charge the jury that all persons dealing with a special agent were bound to take notice of the authority by which the agent acts, and if the agent acts without the scope of his authority such acts will not bind the company.

But the said judge, then and there delivering his opinion and decision, did decide said charge ought not to be given to said jury and refused to give the same; to which ruling and decision of the said judge and his refusal to give said charge defendant, by its attorney, did then and there except.

And the said judge, under the charge and with the directions aforesaid, submitted the said issue and the evidence so given on the said trial to the jury, and the jury aforesaid then and there gave their verdict for the said plaintiffs for the sum of six thousand seven hundred & ninety-eight & $\frac{78}{100}$ dollars ($6,798.78) damages.

124 And the said defendant, by its att'y, then and there, at the term of court aforesaid, did enter in writing and submit to the said court its motion in arrest of judgment and for a new trial for the reasons following, to wit:

That the verdict is contrary to law.

That the verdict is contrary to the charge of the court.

That the court erred in refusing to give the charges asked for by the defendant, numbered 1, 2, 3, 4, & 6.

That the court erred in giving the charge to the jury on the ground and exceptions as noted at the time of giving the same and on file in this cause.

That the court erred in admitting the certified copy of the alleged contract in evidence.

That the court erred in admitting the so-called original duplicate copy of the alleged contract in evidence.

That no contract or neither of the alleged contracts admitted in evidence were properly proven.

That neither of said alleged copies of said contract contained the corporate seal of said company, nor was it the deed of the said company.

And the said motion coming on to be heard on the 4th day of May, A. D. 1891, at the term aforesaid, the said court did order and decide that the said motion should not be granted; to which decisson and ruling of the said judge defendant, by its attorney, did then and there except.

Whereupon the court aforesaid, on the 4th day of May, A. D. 1891,
at the term aforesaid, did render judgment in favor of the said
plaintiffs and against the said defendant in the sum of six thousand
seven hundred & ninety-eight & $\frac{78}{100}$ —, damages and costs, as
125 appears of record; and inasmuch as the said several matters
objected to or insisted upon and considered by the court do
not appear by record of the verdict and judgment aforesaid, the
said defendant, by its attorney, did then and there, on this the eighth
day of June, 1891, at the term aforesaid, on notice to pl'ffs' att'y, and
in his place in court, propose this its bill of exceptions to the said
opinions and decisions of the said judge and request him to sign
the same according to the rules and practice of this court and the
statutes in such case made and provided, which is done this the 3rd
day of August, 1891. The exhibits, the copies, the original record
were destroyed by fire.

CHAS. SWAYNE,
Judge of the U. S. District Court, Northern District of Florida,
Sitting as U. S. Circuit Court Judge in and for the Fifth
Judicial District, Northern District of Florida.

The above was approved and intended to be signed June 8th, 1891, but signeture was omitted by inadvertance of the court, and it is now signed August 3, 1891, with the intent to give it the same force and effect as if signed June 8th, 1891.

Done August 3, 1891.

CHAS. SWAYNE.
U. S. Judge.

Endorsed: United States circuit court, fifth circuit, northern district of Florida. Mary J. Hooper *et al. vs.* Jacksonville, Mayport, Pablo Railway & Navigation Co. Bill of exceptions. Filed June 8th, 1891. Philip Walter, clerk.

126 United States Circuit Court, Fifth Circuit, Northern District of Florida.

MARY J. HOOPER & HENRY H. HOOPER, Her Husband,
vs.
THE JACKSONVILLE, MAYPORT, PABLO RAILWAY & NAVIGATION COMPANY.

Please take notice that on Friday afternoon, the 29th inst., at the office of his honor Judge Swayne, or wherever the said judge may then be, in the city of Jacksonville, I will move to settle the bill of exceptions in this case.

H. H. BUCKMAN,
Def't's Att'y.

To J. R. Challen, Esq., att'y for pl'ffs.

Due service of a copy of above notice admitted this 27th day of May, A. D. 1891.

JAMES R. CHALLEN,
Pl'ffs' Att'y.

Endorsement: Notice to settle bill of exceptions. Filed June 9, 1891. Philip Walter, clerk.

127 And afterwards, to wit, on the 8th day of June, A. D. 1891, came the defendant, by its attorney, and applied for & filed in the clerk's office aforesaid its application for a writ of error to the Supreme Court of the United States, & also filed its assignment of errors & bond, which are in words and figures following, to wit:

128 In the Circuit Court of the United States, Fifth Circuit, Northern District of Florida.

MARY J. HOOPER & HENRY H. HOOPER, Her Husband, and William F. Porter, for the Use of Mary J. Hooper, Plaintiffs,
vs.
JACKSONVILLE, MAYPORT, PABLO RAILWAY & NAVIGATION COMPANY, Defendant.

And now comes the defendant in the above-entitled cause and hereby prays and applies for a writ of error herein to the Supreme

Court of the United States to review the proceedings and judgment rendered in said cause against defendants, rendered at a term of said court, to wit, on the 4th day of May, A. D. 1891, wherein, as will by said record, proceedings, and judgment fully appear, manifest error hath happened, to the great damage of defendant company.

H. H. BUCKMAN,
Att'y for Defendant Company.

Endorsement: In the circuit court of the United States, fifth circuit, northern district of Florida. Mary J. Hooper *et al. vs.* Jacksonville, Mayport, Pablo Railway & Navigation Company. Petition for writ of error. Filed June 8, 1891. Philip Walter, clerk. H. H. Buckman, att'y for def't.

129 In Supreme Court of the United States.

JACKSONVILLE, MAYPORT, PABLO RAILWAY & NAVIGATION COMPANY, Plaintiff in Error,
vs.
MARY J. HOOPER, HENRY H. HOOPER, Her Husband, & William F. Porter, for the Use of Mary J. Hooper, Defendants in Error.

In the matter of the petition for writ of error of the Jacksonville, Mayport, Pablo Railway & Navigation Company.

Assignment of Errors.

And now, on this the 8th day of June, A. D. 1891, comes the plaintiff in error above name-, by H. H. Buckman, its attorney, and files in the clerk's office of the circuit court for the fifth circuit of the United States for the northern district of Florida, with its petition for said writ of error, this its assignment of errors, and says in the record and proceedings in the above-entitled matter there is manifest error, in this, to wit:

1st. That the declaration and the amended declaration aforesaid and the matters therein contained are not sufficient in law for the plaintiff-, the said Hooper *et al.*, to have or maintain their aforesaid action thereof against said company defendant.

2nd. That the court erred in overruling defendant company's demurrers to said declaration and amended declarations.

130 3rd. That the court erred in sustaining plaintiffs' demurrer to defendant's plea of *ultra vires* and in overruling the said plea of *ultra vires.*

4th. That the court erred in admitting in evidence, over defendant company's objection, what purported to be a certified copy of what purported to be a lease between plaintiffs and defendant company, the original being present and accounted for.

5th. That the court erred in admitting in evidence, over defendant's objection, the paper purporting to be a lease between the plaintiffs and defendant company, the same never having been executed by defendant company. It was not the deed of the company nor any sufficient proof of execution given on the trial of said cause.

6th. The court erred in deciding said alleged lease was the deed of the defendant company.

7th. The court erred in permitting the evidence of the witness Mary J. Hooper and in overruling defendant's motion to strike out the same, it being irrelevant and not sufficient to prove execution of such alleged lease. Such testimony was as follows:

I am plaintiff. (Paper purporting to be original lease between plaintiff and defendant, signed in the original handwriting, but with only private seal and no corporate seal, handed witness.) I don't know if this is the original. I never had it recorded; understood original was left with defendant's counsel. He was our att'y. I have not original. I was absent from the State at time.

8th. The court erred in admitting the evidence of Mary Roberts and Chas. F. Warriner, witnesses for plaintiff-, over defendant's objection, and in refusing defendant's motion to strike out the same.

Mary Roberts testified: Knew Alex. Wallace; he is dead; was pres't of defendant company; died 1889. I rented hotel from April to Nov., 1889; rented from Warriner, secretary of defendant company. Wallace told me to go to Warriner. Paid Warriner one month's rent, $75, and he gave me receipt. (Shows receipt signed by Warriner, secretary, and with company's seal.) This is
131 hotel in controversy. I was to get lease of Wallace; he was to sign it; lease never signed; remained in possession til Nov., 1889, when it burned; turned over to Warriner $800 in accounts for rent; heard Wallace say, in conversation in which you you (pl'ffs' counsel) was present, Why don't you (pl'ffs' counsel) get hotel insured? I have tried, but can't. I don't want to have to pay $6,000 if it burns. This conversation was all by way of a joke.

Warriner testified he was secretary of company in 1888; Ming was superintendent, Buckman counsel. He never had original lease; lease was in Ming's possession, in his office; thinks he saw it there once, in January or February, 1889; don't know if recorded; property leased to Mrs. Roberts. I drew up lease; never knew property leased to company till Ming took charge and sent in report; nothing on minutes of company or board of directors; had leased or rented hotel; minutes of company show nothing in regard to it. I rented hotel to Roberts and received the money from her; it was paid by either Ming or Wallace.

I see here in cash book of company (book in witness' hand) there is a hotel account; notice in hotel account Mrs. Roberts, $75. I gave her the receipt; notice here, report Ming so much; can't say if any rent ever paid Mrs. Hooper; these accounts don't show payment of rent to her. Ming's report shows hotel account—expenditures of running hotel and improvements. No resolution of board of directors in regard to hotel appears on its books. I kept the books and minutes. I never received any authority of board of directors or direction from them to give Mrs. Roberts that receipt or receive any money or to do anything in regard to hotel; never received and direction from directors in regard to this hotel.

The testimony was irrelevant; it could not bind the company; the acts were unauthorized; the company was not sufficiently connected with them to bind it; they were *ultra vires*; wallace was dead.

9th. The court erred in admitting the so-called receipt to witness, Mary Roberts; it was given without authority.

10th. The court erred in refusing in evidence the tissue copy of application for insurance made by the agent Wyatt, and in refusing to admit the testimony of witness Nichols in regard thereto, which testimony was: Nichols would have testified that tissue was press copy of Wyatt's handwriting, which he knew; that the tissue
was from the original press book of his office, where such ap-
132 plications were pressed; that the paper was part of their insur-
ance record. It was the usual course of such business to keep tissue copy and send off original application; that original was sent off to get the insurance.

11th. The court erred in refusing to permit in evidence for defendant company their original book of original entry of the acts, minutes, and resolutions of said company kept and so required to be kept to show — nothing appeared in it in relation to this alleged contract or the property; that it contained nothing to authorize the president to make or execute any such contract nor to enter into any such lease; that the company never knew of or recognized anything, as a company, in regard to this alleged contract or hotel. The book, on inspection, showed nothing in relation to this matter, though showing all the acts of the company and minutes of the monthly meeting of its board of directors and business in full.

12th. The court erred in refusing to permit defendant to put or read in evidence the by-laws of the said defendant company. Copy of said by-laws are here attached, marked A.

13th. The court erred in charging the jury that the alleged certified copy and the alleged original or so-called duplicate original of what purported to be a lease by plaintiffs to defendant company was the contract and deed of the defendant company and that it was bound by it; that said alleged deed was signed by the company and by Alexander Wallace, president, and sealed by him, because said alleged deed was not sealed by the company, had nor purported to have no corporate seal, but only the private scroll seal of Wallace opposite his (Wallace's) name; that part of the charge is as follows: "Another copy of the contract, claiming to be a duplicate copy, has also been put in evidence and read to you, and there has been
considerable legal question about these papers. I shall say
133 to the jury that in the opinion of the court these (referring
to certified copy & original) contracts were the contracts of the defendant railroad company, and that they bind the company. I charge you, gentlemen of the jury, that these contracts or this is the contract of the defendant company and the company were bound by it."

14th. The court erred in charging the jury that defendant must show an impossibility—*i. e.*, that it must show it had applied to every insurance company in the world and could not get it insured in any amount and by the offer of any premium whatever—and further charged the jury the defendant, failing to show this and to get insurance, was liable for any and all damages plaintiffs had sustained. That part of the charge is as follows:

"That being the case, there *is* but two questions left for you to settle under this paper: First, was it possible to insure that hotel at any time after the signing of this contract and before the fire, under any circumstances, by the payment of any premium whatever? If it was, they were bound to do it, and if they could do it and did not do it, they are liable for the damages that occurred by not doing it. Not would it be expedient or a difficult thing to do, but could it have been done at all, by anybody, anywhere? It is the defendants' business in this case, it is their duty, to satisfy you that they were unable to do it. It was with the view of getting one of the witnesses' ideas upon this subject thoroughly and fully that I asked the question, peculiar question, that I did. The answer was, as far as that witness is concerned, that under no circumstances, by the payment of any premium, would any company that he had anything to do with insure this property for any person. You are to determine, and it is for you to determine—it is part of your duty in this case, and one of the principal duties which you have to perform in this case—to say whether the defendants have satisfied you that it was absolutely impossible to insure this property. If it was, then they could not do an impossible thing, and the plaintiff cannot recover in this case. If they have not so satisfied you of that fact and you believe that it was possible from the evidence, that it was possible at all—and I put this broadly because the law, in my judgment, is as broad as that—if it was possible at all to carry out the agreement which the company made with the owners of the property to insure for $6,000 and they did not do it, then they are liable for not doing it. Its liability in this instance depends upon whether it was possible or not. If you find that it was not possible, you must find your verdict for the defendant company, and that will be an end of the consideration of the case."

15th. The court erred in charging the jury they could look to their own experience in house-building to determine as to the
134 value of the premises and the reliability of the testimony of the witnesses, thereby prejudicing the minds of the jury against the testimony of witnesses for defendant and styling it as absurd and impracticable, and further charging the jury could find up to the face value of $6,106.67. That part of the charge is as follows:

"If you find from the evidence that it was possible to insure this property at all, then there will be another question: How much were the owners of the property damaged by their failing to do so? and under that head you come to the consideration of the different testimony given as to the value of the property. I would say to you, as to the testimony, you are not bound by any man's testimony. You may take it all if you believe it, you may take part of it, or you are entitled to reject it all. If you agree with one man and disagree with ten others, you may find a verdict upon the testimony of one and against the testimony of ten. If ten men testify to a state of facts which you do not believe and which is absurd and impracticable, you are not bound to find a verdict by it. I do not intend to say much about the value of this property, except that it ran all the way from $3,150 to $8,000. I am not sure but one witness put it at $10,000. You heard the size of the house, 40 x 50, three stories high, with an attic on top of the same; forty-odd rooms, I believe—I do not remember exactly—and the first three stories plastered and a piazza around three sides. The particulars about each little item *is* not important, but the general size of the house. Most of you know, most of you own a house, or you may have had one built, and from that experience and knowledge you will be able to say upon the testimony given whether a house 40 x 50, four stories high, with 40-odd rooms, would cost 3,150, $3,800, $6,000, $8,000, or $10,000, and from that experience and knowledge you will weigh the testimony as given from the stand and come to a conclusion you should under your oaths as to the probable value of the property, and which witness under the circumstances is likely to be correct, whose judgment in the matter was likely to be correct. If a man should come and tell you that the house in which you reside, with ten rooms, that he would build it for $10,000, and another one should tell you it would cost $4,000, you would know, in your judgment, which one was correct. So you will do with the witnesses in this case. You will measure their testimony by your judgment and experience and bring in your verdict accordingly. If you find the company was liable under the first charge, if you find they could ins*i*re the property, then you will find a verdict for the plaintiff what the property is worth, up to $6,106.67."

16th. The court erred in charging the jury that defendant must show they had paid all the rent and could find interest from December 5th, 1889, on the whole recovery, where no evidence was
introduced as to the rent, and the date, December 5th, 1889,
135 was the date of demand for unliquidated damages. That
part of charge was as follows:

"The question of rent, gentlemen of the jury, is one for you to determine. The lease shows rent due unless the defendant shows part of it paid. They only claim $160 rent and interest from Dec. 5th, 1889. If you find for the defendant, your verdict will simply be, We find for the defendant; if you find for the plaintiff, We, the jury, find for the plaintiff, assessing the damages for whatever you find them to be, adding the interest to it from Dec. 5th, 1889."

17th. That the court erred in refusing to give the *d*ollowing charges asked by defendant:

"That the board of directors of the defendant company was the sole power and body under the law authorized to make the alleged contract sued on or authorize the same to be made, and unless the jury find from the evidence that the board of directors of the defendant company had made or authorized the making of said alleged contract, then that the same did not bind said company."

Because the laws of Florida and the charter and by-laws of the company give the directors sole power to make or authorize the making of contracts.

2nd. "If the jury believe from the evidence that the plaintiffs or any of them knew that the property at the time of the making of the alleged contract was not insurable and did not notify the alleged lessees of the fact, then plaintiffs acted in bad faith, and they could not recover."

3rd. "If the jury believe from the evidence that the plaintiffs or any person on their behalf, before the making of the said alleged contract, tried to get insurance on said property in question and insurance had been refused, and they, knowing the same, did not so notify the allaged lessees, then the plaintiffs acted in bad faith, and they could not recover."

4th. "If the jury believe from the evidence that insurance on the property in question was sought to be obtained at the usual places where such insurance would be applied for, and such agencies applied to, representing companies insuring in all parts of the United States, refused to insure the property on the ground that such property was not insurable and insurance companies would not insure such classes of property, then any covenant or agreement to insure was impossible of performance, and plaintiffs cannot recover."

136 6th. "All persons dealing with a special agent are bound to take notice of the authority by which the agent acts, and if the agent acts without the scope of his authority such acts will not bind the company."

Because the evidence showed plaintiffs had tried to get insurance and failed and knew it could not be done.

Because the evidence showed insurance could not be had on such class of property.

Because Wallace had and was given no power to make such contract, and, if binding at all, was his private contract and not the contract of the company.

18th. Because the court overruled the motion for a new trial.

19th. Because there was no legal or sufficient testimony to warrant the verdict of the jury or for the amount rendered.

20th. Because the judgment required defendant to pay compound interest and interest on interest.

21st. Because, as it appears by the record and judgment, the said judgment was given against the said defendant company, when by the laws of the land the judgment ought to have been for the said defendant company and against the said Hooper *et al.*, plaintiffs.

Wherefore the said defendant, The Jacksonville, Mayport, Pablo Railway & Navigation Company, prays that the said judgment may be reversed, annulled, and altogether held for nothing, and that it may be restored to all things which it hath lost by reason of the occurrence of such judgment, &c.

H. H. BUCKMAN,
Att'y for Plaintiffs in Error, 1, 2, 3 *Law Exchange*,
Jacksonville, Florida.

Endorsement: In the Supreme Court of the United States. Jacksonville, Mayport, Pablo Railway & Navigation Company, pl'ff in error, *vs.* Mary J. Hooper *et al.*, def'ts in error. Assignment of errors. Filed June 8th, 1891. Philip Walter, clerk. H. H. Buckman, att'y for pl'ff in error.

137 In the Circuit Court of the United States, Fifth Circuit, Northern District of Florida.

MARY J. HOOPER & HENRY H. HOOPER, Her Husband, and WILLIAM F. PORTER, for the Use of MARY J. HOOPER, Plaintiffs,
vs.
JACKSONVILLE, MAYPORT, PABLO RAILWAY & NAVIGATION COMPANY, Defendants.

Know all men by these presents that we, The Jacksonville, Mayport, Pablo Railway & Navigation Company, a corporation operating and existing under the laws of the State of Florida, as principal, and Mary Wallace and John N. C. Stockton, as sureties, are held and firmly bound unto Mary J. Hooper and Henry H. Hooper, her husband, and William F. Porter, for the use of Mary J. Hooper, in the sum of ten thousand dollars ($10,000.00); for the payment of which, well and truly to be made, we bind ourselves, our heirs, successors, executors, and administrators, jointly and severally, firmly by these presents.

Signed and sealed with our seals this the eighth day of June, A. D. 1891.

The condition of the above obligation is such that whereas the above-named plaintiffs, Marty J. Hooper and Henry H. Hooper, her husband, and William F. Porter, for the use of Mary J. Hooper, did, on the 5th day of May, A. D. 1891, recover in the circuit court of the United States aforesaid, in the above-entitled cause, judgment against the said above-bounden The Jacksonville, Mayport, Pablo Railway & Navigation Company, defendant, for the sum of
138 six thousand seven hundred and ninety-eight & $\frac{70}{100}$ and costs of suit;

And whereas the said above-bounden The Jaksonville, Mayport, Pablo Railway & Navigation Company has applied for and sued out a writ of error to the next ensuing term of the Supreme Court of the United States, to be held at Washington, in the District of Columbia, on the 2nd Monday of October, A. D. 1891, to review the proceedings and said judgment in the above-entitled cause recovered against it by the said plaintiffs:

Now, therefore, if the said above-bounden The Jacksonville, Mayport, Pablo Railway & Navigation Company shall well and truly prosecute the said writ of error to effect, and shall pay to the above-named plaintiffs all damages and costs rendered and to be rendered or which they may sustain in case the judgment of the said circuit court shall be affirmed by said Supreme Court, then this obligation to be void; else to remain in full force and virtue.

JACKSONVILLE, MAYPORT,
PABLO RAILWAY & NAVIGATION COMPANY, [CORPORATE SEAL.]
By J. N. C. STOCKTON, *President.*

Attest: WM. WALLACE, *Secretary.*

MARY WALLACE. [SEAL.]
JOHN N. C. STOCKTON. [SEAL.]

Witnesses:
W. A. DELL.
S. L. EARLE.

Taken & approved this 8th of June, 1891.

CHAS. SWAYNE, *Judge.*

Endorsement: In circuit court of United States, 5th circuit, northern dist. of Fla. Mary J. Hooper *et al. vs.* J., M., P. R'y & N. Co. Supercedeas bond. Filed June 8, 1891. Philip Walter, clerk.

139 And on the 30th day of May, A. D. 1891, came the plaintiffs, by their attorney, and filed in the clerk's office aforesaid *its* application to establish record in words and figures following, to wit; also the order of the judge thereon:

140 Circuit Court, Northern District of Florida.

MARY J. HOOPER, HENRY H. HOOPER, Her Husband, and W. F. Porter, for the Use of Mary J. Hooper, Plaintiffs,
vs.
THE JACKSONVILLE, MAYPORT, PABLO Railway and Navigation Co., Defendant.
} Application to Restore Record.

To the honorable the judge of said court:

Mary J. Hooper and Henry H. Hooper, her husband, and William F. Porter, for the use of Mary J. Hooper, respectfully represents and avers that the records in this cause was burned in the fire which destroyed the clerk's office and court-rooms of this court, on or about May 19th, A. D. 1891, without any fault or neglect of plaintiffs aforesaid; that certified copies of such record cannot be obtained by them, and they show herewith the substance of so much of said record so destroyed as will result in damage to them unless restored, and aver that unless the same is supplied the loss will result in damage to them.

The said plaintiffs apply for the restoring of the said substance and effect of said burned records.

MARY J. HOOPER,
H. H. HOOPER,
W. F. PORTER,
By JAMES R. CHALLEN,
Their Att'y.

UNITED STATES OF AMERICA,
Northern District of Florida, } *ss:*

James R. Challen, being first duly sworn, says he is the attorney of record for the plaintiffs in this case, and that the facts stated in the foregoing application are true.

JAMES R. CHALLEN.

Sworn to and subscribed before me this 30th day of May, 1891.

PHILIP WALTER, *Clerk.*

Endorsement: Circuit court of the United States, northern district of Florida. Mary J. Hooper *et al. vs.* The J., M., P. R. & N. Co. Application to restore record. Filed May 30th, 1891. Philip Walter, clerk. J. R. Challen, pl'ffs' att'y.

141 Circuit Court of United States, Northern District of Florida.

MARY J. HOOPER, H. H. HOOPER, Her Husband, and W. F. PORTER, for the Use of MARY J. HOOPER.

The application of the plaintiffs above named, by James R. Challen, their attorney, having been duly filed and presented to restore so much of the record in this cause as will result in damage to the plaintiffs, the court do now order that said application be entered of record.

Done in open court this 30th day of May, A. D. 1891.

CHAS. SWAYNE, *U. S. Judge.*

Endorsement: Circuit court of the United States, north. dist. of Fla. Mary J. Hooper *et al. vs.* The J., M., P. R'y & N. Co. Entry to restore record. Filed May 30th, 1891. Philip Walter, clerk, by Jno. S. Driggs, dep. clerk. J. R. Challen, pl'ffs' att'y.

142 Circuit Court United States, Northern District of Florida.

MARY J. HOOPER, HENRY H. HOOPER, Her Husband, and W. F. Porter, for the Use of Mary J. Hooper, Plaintiffs,
vs.
THE JACKSONVILLE, MAYPORT, PABLO Railway & Navigation Company, Defendant.
} Application to Restore Record.

To the honorable the judge of said court:

Mary J. Hooper and Henry H. Hooper, her husband, and William F. Porter, for the use of Mary J. Hooper, respectfully represents and avers that the record in this cause was burned in the fire which destroyed the clerk's office and court-rooms of this court on or about May 19th, A. D. 1891, without and fault or neglect of plaintiffs aforesaid; that certified copies of such record cannot be obtained by them, and they show herewith the substance of so much of said record so destroyed as will result in damage to them unless restored, and aver that unless the same is supplied the loss will result in damage to them.

The said plaintiffs apply for the restoring of the said substance and effect of said burned records.

MARY J. HOOPER,
H. H. HOOPER,
W. F. PORTER,
By JAMES R. CHALLEN,
Their Att'y.

UNITED STATES OF AMERICA,
Northern District of Florida, } *ss:*

James R. Challen, being first duly sworn, says he is the attorney of record for the plaintiffs in this case, and that the facts
143 stated in the foregoing application are true.

JAMES R. CHALLEN.

Sworn to and subscribed before me this 30th day of May, 1891.

PHILIP WALTER,
Clerk of said Court.

Take notice that on Aug. 3rd, A. D. 1891, or as soon thereafter as the court will hear me, I will apply to the judge of said court then sitting to hear the foregoing application.

JAMES R. CHALLEN,
Pl'ffs' Att'y.

On June 1st, 1891, I served a true copy of the foregoing application and notice upon John N. C. Stockton, president of, and H. H. Buckman, attorney for, the defendant, each personally.

JAMES R. CHALLEN.

Sworn to and subscribed before me Aug. 3rd, 1891.

PHILIP WALTER, *Clerk.*

Endorsement: Circuit court U. S., northern dist. of Florida. M. J. Hooper *et al. vs.* J., M., P. R. & N. Co. Application to restore record & notice. Filed Aug. 3, 1891. Philip Walter, clerk. J. R. Challen, pl'ffs' att'y.

144 And afterwards, to wit, on August 4th, 1891, the court made the following order on said application:

145 Circuit Court of the United States, Northern District of Florida.

MARY J. HOOPER, HENRY H. HOOPER, Her Husband, and W. F. PORTER, for the Use of MARY J. HOOPER,
vs.
THE JACKSONVILLE, MAYPORT, PABLO RAILWAY AND NAVIGATION COMPANY.

Entry Restoring the Substance and Effect of so Much of the Record as Plaintiffs Apply for.

This cause coming on to be heard upon the application of the plaintiffs to restore the substance of so much of the record in this cause as will result in damage to them if the loss is not supplied, which application was made June 1st, A. D. 1891, and it appearing to the court that a copy of said application and notice that the same would be heard this day were both personally served upon John N. C. Stockton, president of the defendant company, and H. H. Buckman, Esq., attorney for said defendant, on the first day of June, A. D. 1891, and that more than sixty days have elapsed, it is now ordered that the said substance and effect of said destroyed record, so filed by the plaintiffs June 1st aforesaid and made a part of this order as Exhibit A hereto, be entered of record herewith, and that the same be, and is hereby, made a part of the record in this cause.

Done in open court this Aug. 4th, A. D. 1891.

CHAS. SWAYNE, *U. S. Judge.*

Endorsement: Circuit court U. S., north. dist. of Fla. Mary J. Hooper *et al. vs.* The J., M., P. R. & N. Co. Entry granting application and restoring record. Filed Aug. 4, 1891. Philip Walter, clerk. J. R. Challen, pl'ffs' att'y.

146 And on June 8th, 1891, came the defendant, by its attorney, and filed its application to establish the record herein; which application is as follows:

147 In Circuit Court of the United States, Northern Dist. of Fla., 5th Circuit.

MARY J. HOOPER *et al.*
vs.
J., M., P. R'y & N. Co.

And now comes the defendant herein and applies to establish so much of the record in said cause as follows:

The declaration and amended declaration.

The pleas of defendant.

The joinder of issue.

The demurrers to declaration & amended declaration & ruling of court thereon.

The duplicate original purported leases filed in evidence. See copy attached, bill — exceptions.

The affidavit of continuance. See copy attached, bill of exceptions.

The certified copy or alleged certified copy of the purported lease. Copy attached, bill — exceptions.

The contract of Hufbaur with Hooper. Copy — bill — exceptions.

The charges of court, copy.

The by-laws of defendant company. Copy attached to bill of exceptions.

The præcipe for summons.
" writ.
" declaration.
" note as to special appearance & order overruling same.
" demurrer of defendant.
" order allowing amendment to declaration & amen*t*ment.
" demurrer to amended declaration.
The order allowing amendment to declaration.
148 The amended declaration.
" demurrer to amended declaration.
The order overruling same.
" pleas of defendant.
" demurrer to pleas.
" order of court on demurrer.
" joinder of issue.
" motion for continuance.
" original copy of alleged lease between plaintiffs & defendant, the cause of action.
" certified copy of same.
" contract between Hooper & Hufbaur for building hotel.
" the by-laws of defendant company.
" charges given by the court & those asked by defendant & refused.

The originals of all of which were burned in said fire & copies of all of which are now on file in the clerk's office of this court and here referred to and made part of this application—

Certified copies of which cannot be obtained, and here shows that the same were destroyed by fire while in the possession of the clerk of said court, May 18th, 1891; that such loss was without fault or neglect of defendant, and that unless established it would work great damage to him, and prays establishment of the same, to have *its* same force and effect as the originals might have had.

H. H. BUCKMAN, *For Def'ts.*

Sworn & subscribed before me the 8th of June, 1891.

CHAS. SWAYNE,
U. S. Judge.

149 And on said June 8th, 1891, the court made its order thereon as follows:

150 On reading above it is ordered that the same be filed, and defendants are hereby required to show cause, on or before August 12, 1891, why the same should not be established as here prayed.

CHAS. SWAYNE, *Judge.*

Endorsement: Hooper *et al. vs.* J. M. P. R'y Co. Application and order to establish record. Filed June 8, 1891. Philip Walter, clerk. H. H. Buckman, for appellant.

151 And on the same day, to wit, June 8th, 1891, the said judge, on the application of said defendant, granted an order extending the time for filing the record in the Supreme Court of the United States.

152 And afterwards, on Aug. 1st, 1891, the defendant filed its motion for calling up said application to establish said record in the words & figures following:

153 In United States Circuit Court, Fifth Circuit, Northern District of Florida.

MARY J. HOOPER *et al.*
vs.
JACKSONVILLE, MAYPORT, PABLO RAILWAY & NAVIGATION COMPANY.

Please take notice that on Saturday, August 1st, at 3 o'clock p. m., or Monday, August 3rd, at 10 o'clock a. m., A. D. 1891, or on such day and hour thereafter that counsel can be heard, I will move, before his honor Charles Swayne, sitting as judge of said court in the city of Jacksonville, Duval county, Florida, wherever in said city the said judge shall then be sitting as judge for the disposal of matters pending in said court, for an order establishing the record, papers, and pleadings filed in the clerk's office of said court, the originals of which were destroyed by fire, as in the said proceedings set forth, as the record, pleadings, and papers in said cause in lieu of and to have the same effect and force as said originals so destroyed.

The said judge will arrive in the city on the noon train and depart Monday night, August 3rd, 1891, to go beyond the limits of the State, to remain indefinitely and for a longer period than August 12th, 1891, as counsel is advised.

H. H. BUCKMAN,
Def't's Att'y.

To J. R. Challen, Esq., pl'ffs' att'y.

Due service of a copy of above notice admitted this 1st day of August, A. D. 1891.

Aug. 1, '91. JAMES R. CHALLEN,
Pl'ffs' Att'y.

Endorsement: Notice. Filed Aug. 1, 1891. Philip Walter, clerk.

154 And afterwards, on August 3d, 1891, the defendant filed in the clerk's office aforesaid its further application to establish so much of such destroyed records in this cause as was to its injury, which, together with the notice and service thereof on plaintiffs and the order of court thereon, *are* in words & figures following:

155 In Circuit Court of the United States, Fifth Circuit, Northern District of Florida.

MARY J. HOOPER *et al.*
vs.
JACKSONVILLE, MAYPORT, PABLO RAILWAY & NAVIGATION COMPANY.

And now comes the defendant herein and applies to establish so much of the record in said cause as follows:

The præcipe for summons,
" writ,
" declaration,
" note as to special appearance and order overruling same,
" demurrer of defendant,
" order allowing amendment to declaration,
" demurrer to amended declaration,
" order allowing amendment to declaration,
" amended declaration,
" demurrer to amended declaration,
" order overruling same,
" pleas of defendant,
" demurrer to pleas,
" order of court on demurrer,
" joinder of issue,
" motion for continuance,
" original copy of alleged lease between plaintiffs and defend*defend*ant, the cause of action,
" certified copy of same,
" contract between Hooper & Hufbauer for building hotel,
" by-laws of defendant company,
" charges given by the court and those asked by defendant and re*re*fused,

the originals of all of which were burned in said fire and copies of all of which are now on file in the clerk's office of this court and here referred to and made part of this application, certified copies of which cannot be obtained, and here shows that the same were destroyed by fire, while in the possession of the clerk of said court, May 18th, 1891; that such loss was without fault or neglect of defendant, and that unless established it will work great damage to him, and prays establishment of the same, to have the same force and effect as the originals might have had.

H. H. BUCKMAN,
Def't's Att'y.

Sworn & subscribed to before me this 3 day of August, A. D. 1891.

——— ———,
Clerk U. S. C't Ct.

156 Endorsement: Served copy of the within notice on the within-named Mary J. Hooper in the northern district of Florida by handing her a true copy and at the same time showing her the original this 15th day of August, 1891. E. C. Weeks, U. S. marshal, by Dep. C. B. Rogers. In the circuit court of the United States, fifth circuit, northern district of Florida. Mary J. Hooper *et al. vs.* Jacksonville, Mayport, Pablo Railway & Navigation Company. Application to establish record. Filed Aug. 3, 1891. Philip Walter, clerk. H. H. Buckman, def't's att'y.

157 In the Circuit Court of the United States, Fifth Circuit, Northern District of Florida.

MARY J. HOOPER *et al.*
vs.
JACKSONVILLE, MAYPORT, PABLO RAILWAY & NAVIGATION COMPANY.

Take notice that an application has been made to said court, copy of which is hereto attached and made part hereof, to establish the records in said cause destroyed by fire May 18th, A. D. 1891, together with the order of said court thereon, copy of which is also attached and made part hereof; and you are hereby further notified that such application will be called up before the judge of said circuit court, sitting at Jacksonville, on October 20th, 1891, at 11 o'clock a. m., or as soon thereafter as counsel can be heard, and said application will be heard and an order asked for establishing such record as prayed.

H. H. BUCKMAN,
Def't's Att'y.

To J. R. Challen, Esq., plaintiffs' attorney; Mary J. Hooper, Henry H. Hooper, Jr., William F. Porter.

158 In the Circuit Court of the United States, Fifth Circuit, Northern District of Florida.

MARY J. HOOPER *et al.*
vs.
JACKSONVILLE, MAYPORT, PABLO RAILWAY & NAVIGATION COMPANY.

In the matter of the application of the defendant for establishment of so much of the record in said cause destroyed by fire as is or will be prejudicial to it.

And now, on this day, this matter coming on to be heard, *and* was argued by counsel; whereupon, upon consideration thereof, it is considered by the court that said application be made matter of record.

It is further ordered that plaintiffs show cause, on or before October 20th, A. D. 1891, if any they have, why said application should not be granted and said record established as prayed.

Aug. 3, 1891.

CHAS. SWAYNE,
Judge District Court, Northern District of Florida,
Sitting as Circuit Judge.

Endorsement: Served copy of the within notice on the within-named Mary J. Hooper, in the northern district of Florida, by handing her a true copy and at the same time showing her the original, this 15th day of August, 1891. E. C. Weeks, U. S. marshal, by Dept. C. B. Rogers. In the circuit court of the United States, fifth circuit, northern district of Florida. Mary J. Hooper *et al. vs.* Jacksonville, Mayport, Pablo Railway & Navigation Co. Order to show cause. Filed Aug. 3, 1891. Philip Walter, clerk.

159 In Circuit Court of the United States, Fifth Circuit, Northern District of Florida.

MARY J. HOOPER *et al.*
vs.
JACKSONVILLE, MAYPORT, PABLO RAILWAY & NAVIGATION COMPANY.

And now comes the defendant herein and applies to establish so much of the record in said cause as follows:

The præcipe for summons,
" writ,
" declaration,
" note as to special appearance and order overruling same,
" demurrer of defendant,
" order allowing amendment to declaration,
" demurrer to amended declaration,
" order allowing amendment to declaration,
" amended declaration,
" demurrer to amended declaration,
" order overruling same,
" pleas of defendant,
" demurrer to pleas,
" order of court on demurrer,
" joinder of issue,
" motion for continuance,
" original copy of alleged lease between plaintiffs and defend-*defend*ant, the cause of action,
" certified copy of same,
" contract between Hooper & Hufbauer for building hotel,
" by-laws of defendant company,
" charges given by the court and those asked by defendant and re*re*fused,

the originals of all of which were burned in said fire and copies of all of which are now on file in the clerk's office of this court and here referred to and made part of this application, certified copies of which cannot be obtained, and here shows that the same were destroyed by fire, while in the possession of the clerk of said court, May 18th, 1891; that such loss was without fault or neglect of defendant, and that unless established it will work great damage to him, and prays establishment of the same, to have the same force and effect as the originals might have had.

H. H. BUCKMAN,
Def't's Att'y.

Sworn & subscribed to before me this 3 day of August, A. D. 1891.

P. WALTER, *Clerk.*

160 In the Circuit Court of the United States, Fifth Circuit, Northern District of Florida.

MARY J. HOOPER *et al.*
vs.
JACKSONVILLE, MAYPORT, PABLO RAILWAY & NAVIGATION COMPANY.

Take notice that an application has been made to said court, copy of which is hereto attached and made part hereof, to establish the record in said cause destroyed by fire May 18th, A. D. 1891, toge*ht*er with the order of said court thereon, copy of which is also attached and made part hereof, and you are hereby further notified that such application will be called up before the judge of said circuit court, sitting at Jacksonville, on October 20th, 1891, at 11 o'clock a. m., or as soon thereafter as counsel can be heard, and said application will be heard and an order asked for establishing such record as prayed.

H. H. BUCKMAN,
Def't's Att'y.

To J. R. Challen, Esq., plaintiffs' att'y; Mary J. Hooper, Henry H. Hooper, Jr., William F. Porter.

161 In the Circuit Court of the United States, Fifth Circuit, Northern District of Florida.

MARY J. HOOPER *et al.*
vs.
JACKSONVILLE, MAYPORT, PABLO RAILWAY & NAVIGATION COMPANY.

In the matter of the application of the defendant for establishment of so much of the record in said cause destroyed by fire as is or will be prejudicial to it.

And now, on this day, this matter coming on to be heard, *and* was argued by counsel; whereupon, upon consideration thereof, it is considered by the court that said application be made matter of record.

It is further ordered that plaintiff show cause, on or before October 20th, A. D. 1891, if any they have, why said application should not be granted and said record established as prayed.

CHAS. SWAYNE,
Judge District Court, Northern District of Florida,
Sitting as Circuit Judge.

Aug. 3rd, 1891.

NORTHERN DISTRICT OF OHIO, *ss:*

On the 11th day of August, 1891, at the city of Cleveland, in my district, I made due service of the above order and accompanying papers by delivering copies thereof to Henry H. Hooper, Jr., at the same time showing him the originals thereof.

B. F. WADE, *U. S. Marshal,*
By GEO. WYMAN, *Deputy.*

Service	2 00
Travel, 1 mile	06
	$2 06

Endorsement: In the circuit court of the United States, northern district of Florida. Mary J. Hooper *et al. vs.* Jacksonville, Mayport, Pablo Railway & Navigation Company. Notice of application to restore record. Served on H. H. Hooper, Jr. Filed Aug. 20, 1891. Philip Walter, clerk.

162 In the Circuit Court of the United States, Fifth Circuit, Northern District of Florida.

MARY J. HOOPER *et al.*
vs.
JACKSONVILLE, MAYPORT, PABLO RAILWAY & NAVIGATION COMPANY.

Take notice that an application has been made to said court, copy of which is hereto attached and made part hereof, to esrablish the records in said cause destroyed by fire May 18th, A. D. 1891, together with the order of said court thereon, copy of which is also attached and made part hereof, and you are hereby further notified that such application will be called up before the judge of said circuit court, sitting at Jacksonville, on October 20th, 1891, at 11 o'clock a. m., or as soon thereafter as counsel can be heard, and said application will be heard and an order asked for establishing such record as prayed.

H. H. BUCKMAN,
Def't's Att'y.

To J. R. Challen, Esq., plaintiffs' attorney; Mary J. Hooper, William F. Porter, Jr., Henry H. Hooper, Jr., plaintiffs.

Endorsed: Served copy of the within notice on the within-named Mary J. Hooper, in the nor. dist. of Florida, by handing her a true copy and at the same time showing her this original, this Aug. 15th, A. D. 1891. E. C. Weeks, U. S. marshal, by Deputy C. B. Rogers. In the circuit court of the United States, fifth circuit, northern district of Florida. Mary J. Hooper *et al.* *vs.* Jacksonville, Mayport, Pablo Railway & Navigation Company. Notice of application to establish record. Copy notice, order, & application sent J. R. Challen Aug. 7, '91, att'y for pl'ff. H. H. Buckman. Filed Aug. 3, 1891. Philip Walter, clerk. H. H. Buckman, def't's att'y.

163 In Circuit Court of the United States, Fifth Circuit, Northern District of Florida.

MARY J. HOOPER *et al.*
vs.
JACKSONVILLE, MAYPORT, PABLO RAILWAY & NAVIGATION COMPANY.

And now comes the defendant herein and applies to establish so much of the record in said cause as follows:

The præcipe for summons,
" writ,
" declaration,
" note as to special appearance and order overruling same,
" demurrer of defendant,
" order allowing amendment to declaration,
" demurrer to amended declaration,
" order allowing amendment to declaration,
" amended declaration,
" demurrer to amended declaration,
" order overruling same,
" pleas of defendant,
" demurrer to pleas,
" order of court on demurrer,
" joinder of issue,
" motion for continuance,
" original copy of alleged lease between plaintiffs and defendant, the cause of action,
" certified copy of same,
" contract between Hooper & Huffbauer for building hotel,
" by-laws of defendant company,
" charges given by the court and those asked by defendant and refused,

the originals of all of which were burned in said fire and copies of all of which are now on file in the clerk's office of this court and here referred to and made part of this application, certified copies of which cannot be obtained, and here shows that the same were destroyed by fire, while in possession of the clerk of said court, May 18th, 1891; that such loss was without fault or neglect of defendant, and that unless established it will work great damage to him, and prays establishment of the same, to have the same force and effect as the originals might have had.

H. H. BUCKMAN,
Def't's Att'y.

164 Sworn to and subscribed before me this 3rd day of August, A. D. 1891.

P. WALTER, *Clerk.*

In the Circuit Court of the United States, Fifth Circuit, Northern District of Florida.

MARY J. HOOPER *et al.*
vs.
JACKSONVILLE, MAYPORT, PABLO RAILWAY & NAVIGATION COMPANY.

In the matter of the application of the defendant for establishment of so much of the record in said cause destroyed by fire as is or will be prejudicial to it.

And now, on this day, this matter coming on to be heard, *and* was argued by counsel; whereupon, upon consideration thereof, it is considered by the court that said application be made matter of record.

It is further ordered that plaintiff show cause, on or before October 20th, A. D. 1891, if any they have, why said application should not be granted and said record established as prayed.

CHAS. SWAYNE,
Judge District Court, Northern District of Florida,
Sitting as Circuit Judge.

Aug. 3rd, 1891.

Endorsement: I hereby certify that on the 14th day of August, 1891, at the city of New York, in my district, I personally 165 served the within notice, application, & order upon the within-named William F. Porter by exhibiting to him the within original and at the same time leaving with him a copy thereof. John W. Jacobs, United States marshal, southern District of New York. Dated August 15, 1891. (D. R. P.) In the circuit court of the United States, northern district of Florida. Mary J. Hooper *et al. vs.* Jacksonville, Mayport, Pablo Railway & Navigation Company. Original notice of application to restore record. Filed Aug. 28, 1891. Philip Walter, clerk.

166 And the said court having by its several orders extended the time of filing the said record in the Supreme Court of the United States by reason of the impossibility of filing a copy of the same until said record could be re-established, the plaintiffs, by their attorneys, did, on the 19th day of Oct., A. D. 1891, file in the clerk's office aforesaid the traverse & objections to such record sought to be established as follows:

167 Circuit Court United States, Northern District of Florida.

MARY J. HOOPER *et al.*
vs.
JACKSONVILLE, MAYPORT, PABLO RAILWAY & NAVIGATION CO.

Traverse of Copies of Record Offered as Substitutes.

And now comes the plaintiff Mary J. Hooper and denies that the lease attached to the declaration and sought to be established as a true copy of the lease marked Exhibit "A" is a true copy, and for errors shows and avers, 1st, that the paper attached to the original declaration had the word "seal" in parenthesis, affixed after the name of the Jacksonville, Mayport, Pablo Railway & Navigation Company instead of after the signature of Alex. Wallace.

2nd. That after the official signature of H. H. Buckman to the certificate of acknowledgment as notary public there was the word "seal" in parenthesis instead of the words "notarial seal," as in this proposed copy.

3rd. That attached to the certificate of acknowledgment by John M. Tirney as notary public was the word "seal" in parenthesis instead of the words "notarial seal," as in this proposed copy.

4th. That after the certificate to the jurat, before W. A. Bours, notary public, to the demurrer was the word "seal" in parenthesis instead of the words "official seal," as in this proposed copy, the word "official" having evidently been interpolated even since the copy was written.

5th. That the charge of the court is incorrectly copied, in this: that after the words in the 8th and 9th lines, "and also signed by the Jacksonville, Mayport, Pablo Railway & Navigation Company and
sealed," there should be a punctuation-mark, to wit, a
168 comma.

6th. In the second paragraph of the charge, first sentence, the court is made to utter an ungrammatical sentence.

7th. The figures at the end of the paragraph next to the last should be $6,000.00 instead of $6,167.00, and in the last paragraph the figures $106.67 should be substituted for $160.00, as in this proposed copy.

8th. In the last line of the charge the words "up to and not exceeding $6,106.67" should be inserted just before the words "adding the interest," as in the charge really given by the court.

And she denies that the papers filed are true copies of the respective originals.

JAMES R. CHALLEN,
Attorney for Pl'ff.

DUVAL COUNTY,
N. Dist. of Fla.

James R. Challen, being first duly sworn, says that he is attorney of record for the plaintiffs, and that of his own knowledge he knows better than his clients in this case the truth of the facts stated in the foregoing traverse, and that said facts so stated are true, as he verily believes.

JAMES R. CHALLEN.

Sworn to and subscribed before me Oct. 19th, 1891.

JNO. S. DRIGGS,
[SEAL.] *Dep. Clerk U. S. Courts.*

Endorsed: Circuit court United States, northern district of Florida. Mary J. Hooper *et al. vs.* The J., M., P. R. & N. Co. Traverse of copies of record offered as substitute. Filed October 19th, 1891. Philip Walter, clerk, by Jno. S. Driggs, dep. clerk. J. R. Challen, att'y for pl'ff.

169 United States Circuit Court, Fifth Circuit, Northern District of Florida.

MARY J. HOOPER *et al.*
vs.
THE JACKSONVILLE, MAYPORT, PABLO RAILWAY & NAVIGATION CO.

To J. R. Challen, Esq., att'y for pl'ffs:

You will please take notice that on Monday, the 7th inst., at 11 o'clock a. m., before the judge of said court, at the court-house, in Jacksonville, or wherever the said judge of the said court may then be sitting, or as soon thereafter as counsel can be heard, I will move for a hearing upon the paper filed by you, endorsed objections and traverse of the record filed in this cause on the part of the defendant to be established by it as the original record, and for an order establishing said record, and for such other order in the case as shall be consistent and proper.

H. H. BUCKMAN,
Att'y for Defendant.

Jacksonville, Fla., Dec. 5th, 1891.

Due service of a copy of above notice admitted this 5th day of December, A. D. 1891.

JAMES R. CHALLEN,
Att'y for Pl'ffs.

Endorsed: Hooper *vs.* J., M., P. R. & N. Co. Notice motion to hear traverse to record. Filed Dec. 9, 1891. Philip Walter, clerk.

170 United States Circuit Court, Fifth Circuit, Northern District of Florida.

MARY J. HOOPER *et al.*
vs.
JACKSONVILLE, MAYPORT, PABLO RAILWAY & NAVIGATION COMPANY.

Please take notice that the notice heretofore given in this matter to take up and dispose of the objections and traverse to the record in this case sought to be established by the defendant, which was set for this a. m., is postponed by the said judge for hearing until —, and that we will call the same up before the said judge for hearing and final disposition on Wednesday, the 9th inst., at 10 o'clock a. m., and for such other and further order in said cause *of* establishing said record, &c., as shall be meet and proper.

H. H. BUCKMAN,
Att'y for Def't.

To J. R. Challen, Esq., att'y for pl'ffs.

Jacksonville, Fla., Dec. 7th, 1891.

Due service of a copy of above notice admitted this 7th day of December, A. D. 1891.

JAMES R. CHALLEN,
Att'y for Pl'ffs.

Endorsed: Hooper *vs.* J., M., P. R. & N. Co. Notice of motion. Filed Dec. 9, 1891. Philip Walter, clerk.

171 Circuit Court United States, Northern District of Florida.

MARY J. HOOPER *et al.*
vs.
JACKSONVILLE, MAYPORT, PABLO RAILWAY COMPANY.

Entry.

This cause, coming on to be heard upon the plaintiffs' traverse of copies of record offered as substitutes and the affidavit in support of the same, was submitted, and thereupon, after due consideration, it is ordered and adjudged by the court that the word "seal" be placed after the name of the Jacksonville, Mayport, — Railway and Navigation Company instead of after the signature of Alexander Wallace; that the word "seal" instead of the word- "notarial seal" be placed to the certificates — H. H. Buckman & John M. Tierner in the paper attached to the declaration as an exhibit, and that in the charge of the court, after the words in the 8th and 9th lines, "and also signed by the Jacksonville, Mayport, Pablo Railway & Navigation Company and sealed," there should be put a comma, and that the figures should be changed from \$6,167.00 to \$6,106.67, as claimed in the said traverse; and, the said alterations being made, the said copies so offered as substitutes are now received and recorded as such.

Done in court this December 9th, 1891.

CHAS. SWAYNE,
U. S. Judge.

Endorsed: Circuit — United States, northern district of Florida. Mary J. Hooper *et al. vs.* The J., M., P. R. & N. Co. Entry sustaining traverse to copies. Filed Dec. 9, 1891. Philip Walter, clerk. J. R. Challen, att'y for pl'ff.

172 In United States Circuit Court, Fifth Circuit, Northern District of Florida.

MARY J. HOOPER & HENRY H. HOOPER, Her Husband,
vs.
THE JACKSONVILLE, MAYPORT, PABLO RAILWAY & NAVIGATION CO.

And now, on this day, this cause coming on to be further heard on the application of defendant to establish so much of the record and proceedings in said cause destroyed by the late fire of May 18th, 1891, which destroyed the original files and papers in said cause and all the records of this court, as would result in loss or damage to defendant, and it appearing that the defendant has made due and proper application by petition previously to this court; that no certified copies of said record exist; that all the originals were destroyed without the fault or neglect of the defendant; that said application shows the substance of such record so destroyed by fire; that the same has been duly entered of record in the records of this court; that it will result in loss and damage to this defendant unless such record as applied for shall be established as prayed; and it further appearing that copies of such application have been duly served personally upon all the interested parties herein, together with a written notice of the hearing of such application, more than sixty days prior hereto, and the court being now satisfied of the truth of the matters contained in said application—

It is upon consideration thereof ordered that the said application and the matters thereof be granted.

173 It is further ordered that such record so sought to be established and as prayed in said application, to wit, the præcipe for summons, the writ, the declaration, the note as to special appearance and order overruling the same, the demurrer of defendant, the order allowing amendment to declaration, the demurrer to amended declaration, order allowing amended declaration, amended declaration, demurrer to amended declaration, order overruling the same, pleas of the defendant, the demurrer to pleas, the order of the court on the demurrer, joinder of issue, motion for continuance, original copy of the alleged lease between plaintiffs and defendant, the cause of action, certified copy of the same, the contract between Hooper and Huffbauer for building hotel, the by-laws of defendant company, the charges given by the court and those asked by the defendant and refused, as set forth in said application, be, and the same are hereby, declared to be established as and in lieu of the originals so destroyed as aforesaid, and that the said record so established shall from this time henceforth and hereafter have in all respects the same effect and validity as the original record would or could have had.

It is further ordered that this order be entered of record.

Done and ordered this the 9th day of December, A. D. 1891.

CHAS. SWAYNE,
U. S. Judge.

Endorsed: In United States circuit court, fifth circuit, northern district of Florida. Mary J. Hooper *et al. vs.* Jacksonville, Mayport, Pablo Railway & Navigation Company. Order establishing record. Filed Dec. 9, 1891. Philip Walter, clerk.

174 In Circuit Court of United States, Nor. District of Fla.

H. H. HOOPER *et al.*
vs.
J., M., P. R'Y CO.

And now, on this day, the attorney for the defendant in error having again made application to the court for the changing in the record of the word seal in the instrument designated the duplicate original lease between the defendant company and the plaintiffs, and that the word seal should be placed in said paper after the name of the defendant company instead of after the name of Alexander Wallace, president, counsel for plaintiffs Hooper contending that the word seal was so placed after the name of the company in the duplicate original instrument which was destroyed by fire in the records of this court, and producing a certified copy from the record of a copy of said original, which certified copy of such copy showed the word seal so placed after the name of said company, and counsel for defendant company producing an office copy of said duplicate original which showed after the name of defendant company the word seal, but also notation by said counsel made at time of having said copy of such duplicate original made that there was no corporate seal made to the duplicate original instrument, and said counsel contending that in the original instrument there was no corporate seal on said original, and that the word seal was written only after the name of Alexander Wallace, president, and the court having no recollection of the matter, it is ordered that the application be granted and in all places in the record now being made up in the said papers denominated leases the clerk shall place
175 the word seal after the name of defendant company.

Done and ordered this Jan'y 4th, 1892.

CHAS. SWAYNE,
U. S. Judge.

Counsel for def't Co. asked to take exceptions to above order; which application was refused this 4th day of Jan'y, 1892.

CHAS. SWAYNE,
U. S. Judge.

Endorsed: Filed Jan. 4th, 1892. Philip Walter, clerk.

176 I, Philip Walter, clerk of the United States circuit court, 5th judicial circuit, northern district of Florida, do hereby certify that the foregoing pages, numbered from 1 to 175, both inclusive, are a true, full, and complete copy of the re-established record in the case of Mary J. Hooper *et al. vs.* Jacksonville, Mayport, Pablo Railway & Navigation Company (the original having

been destroyed by fire), as the same appears from the files and records of my office, and that service of writ of error on the defendant in error was duly made by the lodgement of copy for the defendant in error in my office on June 8th, 1891, within 60 days of the rendition of the judgment.

Seal U. S. Circuit
Court, Northern
Dist. of Florida.

In witness whereof I have hereunto set my hand and affixed the seal of this circuit court, at the city of Jacksonville, in the district and circuit aforesaid, this 6th day of January, A. D. 1892, and of our Independence the 116th year.

PHILIP WALTER,
Clerk U. S. Cir't Ct.

177 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States, 5th judicial circuit, northern district of Florida, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Mary J. Hooper, Henry H. Hooper, Jr., her husband, and William F. Porter, for the use of Mary J. Hooper, plaintiffs, and The Jacksonville, Mayport, Pablo Railway and Navigation Company, defendant, a manifest error hath happened, to the great damage of the said defendant, the said Jacksonville, Mayport, Pablo Railway & Navigation Company, as by *his* complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things
178 concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the seventh day of July, A. D. 1891, in the said Supreme Court, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the eighth day of June, in the year of our Lord one thousand eight hundred and ninety-one.

[Seal U. S. Circuit Court, Northern Dist. of Florida.]

PHILIP WALTER, *Clerk.*

Allowed this June 8th, 1891, by—

CHAS. SWAYNE,
Dist. Judge, Sitting as Circuit Judge in Open Court.

179 [Endorsed:] In Supreme Court of United States. Jacksonville, Mayport, Pablo Railway and Navigation Co., pl't'ff in error, *vs.* Mary J. Hooper *et al.*, def'ts in error. 2. Writ of error. Filed June 8, 1891. Philip Walter, clerk. 2.

180 UNITED STATES OF AMERICA, *ss:*

To Mary J. Hooper, Henry H. Hooper, Jr., her husband, and William F. Porter, for the use of Mary J. Hooper, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the seventh day of July, A. D. 1891, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States, 5th circuit, for the northern district of Florida, wherein The Jacksonville, Mayport, Pablo Railway & Navigation Company is plaintiff in error and you, Mary J. Hooper, Henry H. Hooper, Jr., her husband, and William F. Porter, for the use of Mary J. Hooper, are defendant- in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this June 8th, A. D. 1891.

CHAS. SWAYNE,
District Judge, Sitting as Circuit Judge in Open Court.

181 [Endorsed:] In Supreme Court of the United States. The Jacksonville, Mayport, Pablo Railway & Navigation Co., pl't'ff in error, *vs.* Mary J. Hooper *et al.* Citation to hear errors. 2. Filed June 8, 1891. Philip Walter, clerk.

Rec'd this writ this June 13th, 1891, and served the same this June 13th, 1891, in the county of Duval and State of Florida, in northern district of Florida, in the fifth circuit of the United States, by delivering a true copy thereof to James R. Challen, Esq., the att'y of record for Mary J. Hooper, Henry H. Hooper, her husband, and William F. Porter, defendants in error within named, at the same time showing him this original citation.

E. C. WEEKS,
United States Marshal for the Northern District of Florida,
By C. B. ROGERS, *Deputy.*

Endorsed on cover: Case No. 14,962. N. Florida C. C. U. S. Term No., 80. The Jacksonville, Mayport, Pablo Railway & Navigation Company, plaintiff in error, *vs.* Mary J. Hooper, Henry H. Hooper, Jr., her husband, & William F. Porter, for the use of Mary J. Hooper. Filed January 11, 1892.

Office Supreme Court U. S.
FILED
OCT 14 1895
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 80.

THE JACKSONVILLE, MAYPORT, PABLO RAILWAY AND NAVIGATION COMPANY, PLAINTIFF IN ERROR,

vs.

MARY J. HOOPER, HENRY H. HOOPER, JR., HER HUSBAND, AND WILLIAM F. PORTER, FOR THE USE OF MARY J. HOOPER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

BRIEF OF ATTORNEY FOR PLAINTIFF IN ERROR.

J. C. COOPER,
Attorney for Plaintiff in Error.

IN UNITED STATES SUPREME COURT.

The Jacksonville, Mayport, Pablo Railway & Navigation Company, Plaintiff in Error, vs. Mary J. Hooper et al., Defendants in Error.	

BRIEF AND ARGUMENT OF ATTORNEYS FOR PLAINTIFF IN ERROR.

WRIT OF ERROR TO THE CIRCUIT COURT FOR THE NORTHERN DISTRICT OF FLORIDA.

Statement of Case.

This was an action in Covenant brought in the United States Circuit Court for the Northern District of Florida by Mary J. Hooper et al. against the Jacksonville, Mayport, Pablo Railway & Navigation Company, upon one of the alleged covenants in a certain lease which the plaintiffs in the court below claimed had been executed by the said defendant company with plaintiffs. The clause in the lease sued upon was as follows:

"The said party of the second part (the railway company), covenants and agrees to insure the said premises in the sum of $6,000, in a good and responsible insurance company, against loss by fire, and keep the same so insured during the continuance of this lease, for the benefit of the parties of the first part" (the said plaintiffs).

The plaintiffs' declaration alleged that this lease was executed by the defendant company by Alexander Wallace, president, on the one part, and by W. F. Porter, by

H. H. Hooper, Jr., his attorney in fact, and by H. H. Hooper, Jr., and Mary J. Hooper, his wife, of the other part; that the defendant company took possession of said leased property, which consisted of a certain hotel, known as "San Diego Hotel," at Burnside Beach, in Duval county, Florida, in the same county as the city of Jacksonville, Florida, under the above-mentioned lease, and that during the term of said lease, and while the defendant company was in possession, the said hotel was destroyed by fire, and that the defendant railroad company did not insure the said leased property, and did not keep the same insured, as provided in said lease, and that thereby the plaintiffs lost the amount for which it was agreed in said lease that the property should be insured, and plaintiffs sought to recover the value of the destroyed property up to the amount of said agreed insurance. Attached to the declaration was what purported to be a copy of the lease sued upon, purporting to be signed in the name of the defendant railway company by Alexander Wallace, president, with a scrawl or private seal of said Wallace, but having no corporate seal of the defendant company affixed to the said instrument.

The suit was first brought in the name of Mary J. Hooper and Henry H. Hooper, Jr., her husband, and the declaration alleged that W. F. Porter, whose name was signed to the lease, had conveyed all of his interests in said lease to said Mary J. Hooper. A demurrer was sustained to this declaration on account of failure to make Porter a party plaintiff to the suit. An amended declaration was then filed, making Porter a party plaintiff for the use of Mary J. Hooper. This amended declaration was demurred to and the demurrer was overruled. The grounds of the demurrer, in substance, were that the declaration was upon an action in Covenant, whereas, the lease sued upon, a copy of which was attached to, and made a part of the declaration, had no corporate seal of the defendant railway company affixed thereto, and therefore was not the sealed instrument of the defendant railway company, and an action of Covenant would not lie upon the said lease; and on the further ground that the lease attached to, and made a part of the declaration was not the contract of the defendant company, as shown upon the face of the lease, having no corporate seal affixed thereto. The defendant company filed five pleas to this amended declaration, the first plea being the general issue of *non est factum;* the second plea that it, the defendant, never covenanted and agreed with the plaintiffs as alleged in their declaration; the third plea was, that the said covenant contained in the lease mentioned in the declaration to insure the leased premises in the sum of $6,000, in a good and responsible insurance company, against loss by fire, etc., was absolutely null and void, in that the said alleged covenant was impossible of performance, which said impossibility of performance was not known at the time of the making of the said lease; the fourth plea was, that the alleged covenant and agreement to insure, etc., provided in said lease, even if entered into by the defendant railway company, as alleged in the declaration, are and were *ultra vires,* and beyond the scope and power of the defendant railway company to make and enter into, and are alsolutely null and void; the fifth plea was, that the defendant railway company denies that it ever had, held or possessed the premises described in the declaration, or that it had ever paid any rent for said premises, or was in any way liable to the plaintiffs as in said declaration alleged.

The plaintiff filed a demurrer to the third and fourth pleas, and the demurrer was sustained to the fourth plea and overruled as to the third plea.

On these issues the case was tried before the court and a jury. The plaintiff, to support the declaration was permitted by the court to file in evidence a paper purporting to be a copy of the lease, also another paper purporting to be a duplicate of the lease sued on, but none of these papers had affixed thereto the corporate seal of the company, nor was any authority of the company proven to have been given to its President to execute for it the said contract of lease, so attempted to be made in its name in the said lease sued upon. All of these objections were urged to the introduction of these papers in evidence, but the court over-ruled them all, and admitted the papers in evidence.

The defendant proved by four insurance agents in the city of Jacksonville, Florida, (a city in the county of Duval, State of Florida, nearest where the leased premises were located) that no insurance company having an agency in the city of Jacksonville would insure these premises for any amount, although these companies insured property all over the United States and in foreign countries; that this property was considered by the insurance companies as uninsurable, because it was a hotel property not capable of being made to produce a steady and regular revenue, on account of its location, and that consequently the insurance companies refused *to rate* this property for insurance at all, and would not insure it under any circumstances. Some of these witnesses further stated that under no circumstances by the payment of any premium, not any company that they represented could insurance be procured upon the property. The witnesses further stated that application had been made to them for insurance upon this property, which they had refused.

The testimony further showed that J. R. Challen, Esq., the attorney and agent of the plaintiffs, had applied to these insurance agents for insurance upon this property and that they had then refused to insure the property, and that an application had been made by Hooper, himself, to get some outside insurance company to insure same, and both the said Hooper and Challen knew that the property could not be insured.

The defendant offered in evidence the by-laws and minutes of the directors and stockholders of the company for the purpose of showing that the defendant company was not organized to conduct business of the character mentioned in the lease sued on, and that neither the stockholders or board of directors had ever authorized the executing of this lease, and that the president had no authority to make this lease.

The court refused the defendant to introduce this evidence, to which ruling the defendant duly excepted. Evidence was also introduced as to the value of the hotel and other property mentioned in the lease, and of the destruction of the same by fire.

On this evidence, under the charge of the court, the jury found a verdict in favor of the plaintiffs for the full amount of the said insurance, alleged to have been agreed upon in said lease, and interest thereon, aggregating the amount of $6,798.70.

Assignment of Errors.

The following are the errors committed by the court below, which are urged as grounds for reversing the judgment of the said lower court in the above-entitled cause:

First. The court erred in overruling the defendant's demurrer to the plaintiff's amended declaration; said demurrer being in substance that the declaration was in Covenant, whereas, the lease sued upon, on its face, was shown not to be a *sealed* instrument of the defendant company; and further, the said lease was not the contract of the company, not being under its seal and no authority of the president to execute the same being alleged or shown.

Second. The court below erred in sustaining the plaintiffs' demurrer to the defendant's fourth plea. This fourth plea, in substance, alleged that the making of the lease sued on was beyond the corporate power of the defendant, and therefore void. The sustaining of the plaintiff's demurrer to this plea was error, for the reason that the plea put directly in issue the *ultra vires* character of this contract, even if such contract had been attempted to have been regularly entered into by the defendant company.

Third. The court below erred in permitting the plaintiffs to introduce in evidence the alleged certified copy of the lease, as appears in the Bill of Exceptions, on the grounds that the said lease was not shown to be under the seal of the corporation, or authorized by it, and that the paper offered in evidence purported to be only a copy of the lease and not the original, and that the plaintiffs had not shown that the original of said lease was not in their possession or control.

Fourth. The court below erred in permitting the plaintiffs to introduce in evidence the other paper claimed to be a duplicate of the lease sued upon, on the grounds that the same was not shown to be under the seal of the defendant company, nor shown to have been authorized by the company, but appeared only to have affixed thereto the private seal of one Alexander Wallace, claiming to be the president of the defendant company.

Fifth. The court below erred in permitting the plaintiffs' witness, Mary Roberts, to testify as follows:

"Knew Alex Wallace; he is dead; was president of defendant company; died 1889. I rented hotel from April to Nov. 1889; rented from Warriner, secretary of defendant company. Wallace told me to go to Warriner. Paid Warriner one month's rent, $75, and he gave me receipt. (Shows receipt signed by Warriner, secretary, and with Company's seal). This is hotel in controversy. I was to get lease of Wallace ; he was to sign it ; lease never signed; remained in possession until Nov. 1889, when it burned ; turned over to Warriner $800 in accounts for rent ; heard Wallace say, in conversation in which you (plaintiff's counsel) was present, "Why don't you (plaintiff's counsel) get hotel insured ? I have tried but I can't. I don't want to have to pay $6,000 if it burns. This conversation was all by way of a joke." (Page 67 printed record.)

To the introduction of which testimony, defendant by its counsel objected, on the following grounds :

Said Alexander Wallace, president of the defendant company with whom said transactions and conversations are alleged to have taken place, was dead at the time of the trial, and that said transactions and conversation are irrelevant to the issues, because no previous authority was shown to have been given to the said Alexander Wallace as president, to lease said property or to rent said hotel, or for said secretary or treasurer to rent said hotel, or receive money on account of same.

On the further ground that the said transactions were *ultra vires,* and not within the chartered powers of the defendant company.

Sixth. The court below erred in admitting the testimony of the plaintiffs' witness Warriner, over the objections of defendant, as follows, to-wit :

"Warriner testified he was secretary of company in 1888; Ming was superintendant, Buckman counsel. He never had original lease ; lease was in Ming's possession, in his office ; thinks he saw it there once, in January or February, 1889 ; don't know if recorded ; property leased to Mrs. Roberts. I drew up lease ; never knew property leased to company till Ming took charge and sent in report ; nothing on minutes of company or board of directors ; had leased or rented hotel ; minutes of company show nothing in regard to it. I rented hotel to Roberts and received the money from her; it was paid by either Ming or Wallace.

I see here in cash book of company (book in witness' hand) there is a hotel account; notice in hotel account, Mrs. Roberts, $75. I gave her the receipt; notice here, report Ming so much; can't say if rent ever paid to Mrs. Hooper; these accounts don't show payment of rent to her. Ming's report shows hotel account—expenditures of running hotel and improvements. No resolution of board of directors or direction from them to give Mrs. Roberts that receipt or receive any money, or to do anything in regard to hotel; never received any direction from directors in regard to this hotel." (Page 67 printed record.

To the introduction of which testimony defendant, by its counsel, objected, on the following grounds:

Said Alexander Wallace, president of the defendant company, with whom said transactions are alleged to have taken place, was dead at the time of the trial, and that said transactions are irrelevant to the issues, because no previous authority was shown to have been given to the said Alexander Wallace, as president, to lease said property or to rent said hotel, or for said secretary or treasurer to rent said hotel or receive money on account of same.

On the further ground that the said transactions were *ultra vires*, and not within the chartered powers of the defendant company.

Seventh. The court below erred in admitting in evidence the alleged receipt for rent given by the witness Warriner to the witness Mary Roberts, upon the following grounds:

Beccause it was irrelevant to the issues, because no previous authority was shown to have been given to the said Alexander Wallace, as president, to lease said property or to rent said hotel, or for said secretary or treasurer to rent said hotel, or receive money on account of same, or give said receipt.

On the further ground that the said transactions were *ultra vires* and not within the chartered powers of the defendant company.

Eighth. The court below erred in refusing to permit the defendant to introduce in evidence its by-laws for the purpose of showing that the president had no authority to make the lease sued upon without the consent and authority of the stockholders or the board of directors, and for the purpose of showing that the lease sued upon was not within the corporate purposes of the defendant company.

Ninth. The court below erred in refusing to permit the defendant to read in evidence the minutes of its stockholders and board of directors for the purpose of showing that its president had never been authorized to make or execute for it or in its name the lease sued upon in this action.

Tenth. The court below erred in giving the following portion of its charge to the jury, to-wit: "As you are already aware, the claim of the plaintiff is founded upon the contract which has been signed as shown you by Wm. F. Porter and H. H. Hooper, Jr., attorney in fact, and by H. H. Hooper, Jr., and Mary J. Hooper, and also *signed by defendant*, by Alexander Wallace, president, as appears by this copy of the contract, which is stated to be, and I believe is established, to be a certified copy of what was put on record in the matter." To which charge the defendant excepted on the ground that the said judge, in said charge, had charged the jury that this paper writing, the foundation of this suit, was a contract shown to have been signed by the defendant; and in charging the jury that the paper was a certified copy of said lease, whereas the alleged copy had no seal of the defendant upon it; had never been established as a copy, and that the same only contained a copy of the private seal of said Alexander Wallace thereon, and no authority had been shown from the defendant to said Wallace to make the said lease for defendant.

Eleventh. The court below erred in charging the jury as follows:

"Another copy of the contract, claimed to be a duplicate copy, had been also put in evidence, and read to you, and there has been considerable legal question about these papers. I shall say to the jury that, in the opinion of the court, these contracts were the contracts of the defendant railway company, and that they bind the company. I charge you, gentlemen of the jury, that these contracts, or this is a contract, of the defendant company, and the company is bound by it."

To the giving of which charge the defendant excepted, upon the grounds that the papers were copies, and the execution thereof had never been properly proven, and that the seal of the defendant company was not affixed to either of the said papers, and that no authority from the defendant to its president had been shown for executing this contract for defendant, and the contract was beyond the corporate powers and purposes of defendant.

Twelfth. The court below erred in giving to the jury the following charge:

"That being the case, there are but two questions for you to settle under this paper: First, was it possible to insure this hotel after the signing of this contract, and before the fire, under any circumstances, by the payment of any premium whatever? If it was, they were bound to do it, and if they could do it, and did not do it, they are liable for the damages that occurred by not doing it. Not would it be an expedient or difficult thing to do, but could it have been done by anybody, anywhere. It is the defendants' business in this case; it is their duty to satisfy you that they were unable to do it. It was with the view of getting one of the witnesses' ideas upon the subject thoroughly and fairly that I asked the peculiar question that I did. The answer was, that, as far as that witness was concerned, that, under no circumstances, by the payment of any premium with any company that he had anything to do with, could he insure this property for any person. You are to determine, it is part of your duty in this case, and one of the principal duties which you have to perform in this case, to say whether the defendants have satisfied you that it was absolutely impossible to insure this property. If it was, then they could not do an impossible thing, and the plaintiff cannot recover in this case. If they have not so satisfied you of that fact, and you believe that it was possible from the evidence, that it was possible at all—and I put this accurately, because the law, in my judgment is as broad as that, if it was possible at all to carry out the agreement, which the company made with the owners of the property, to insure for $6,000, and they did not do it, then they were liable for not doing it. This liability depends upon whether it was possible or not; if you find that it was not possible you must find your verdict for the defendant company, and that would be an end of the consideration of this case."

To the giving of which charge the defendant duly objected and excepted, upon the grounds that the court in said charge, in effect, charged the jury that it was incumbent on the defendant company to show that it was absolutely impossible to obtain this insurance from anybody, anywhere, and under any circumstances, and by the payment of any premium, which was not a correct construction of the contract, and that the said charge required too much of the defendant, and stated a greater liability than the defendant was under, even if the contract was held to be the defendant's contract.

Thirteenth. The court below erred in giving to the jury the following charge, to-wit: "If you find from the evidence that it was possible to insure this property at all, then there will be another question: How much were the owners of the property damaged by their failing to do so, and under that head you come to the consideration of the different testimony given as to the value of the property. I would say to you, as to the testimony, you are not bound by any man's testimony, but you may take it, but if you believe it you may take part of it, or you are entitled to reject it all. If you agree with one man, and disagree with ten others, you may find your verdict upon the testimony of one, and against the testimony of ten. If ten men testify to a state of facts which you do not believe, and which is absurd and impracticable, you are not bound to find a verdict by it. I do not intend to say much about the value of this property, except that it ran all the way from $3,150 to $8,000. I am not sure but one witness put it at $10,000. You heard the size of the house, 40x50, three stories high, with an attic on top of the same—forty-odd rooms, I believe. I do not remember exactly. The first three stories plastered, and a piazza around three sides. The particulars about each little item is not important, but the general size of the house. Most of you know, most of you own a house, or you may have had one built, and from that experience and knowledge you will be able to say from the testimony given whether a house, 40x50, four stories high, with forty-odd rooms, would cost $3,150, $3,800, $6,000, $8,000 or $10,000, and from that experience and knowledge you will weigh the testimony as given from the stand and come to a conclusion—you should, under your oaths—as to the probable value of the property and which witness under the circumstances is likely to be correct, whose judgment in the matter is likely to be correct, If a man should come and tell you that the house in which you reside, with ten rooms—that he would build it for $10,000 and another tell you that it would cost $4,000, you would know in your judgment which was correct; so you will do with the witness in this case. You will measure their testimony by your judgment and experience and bring in your verdict accordingly."

To the giving of which charge the defendant, by its attorney, duly objected and excepted, upon the grounds that the court in said charge, in effect, authorized the jury to appeal to their personal knowledge and experience as to the value of the property as to the amount of the damages to be awarded, and authorized them upon their personal knowledge and experience to reject the evidence of witnesses which, in their opinion, was absurd or impractical. The tendency of such charge was to permit the jury to ignore the testimony where it did not coincide with their personal experience or opinion.

Fourteenth—The court erred in charging the jury in reference to rent due, as follows:

"The question of rent, gentlemen of the jury, is one for you to determine. The lease shows part of it paid. They only claim $106.67 rent and interest from Dec. 5, 1889."

To the giving of which charge defendant objected, on the ground that the court instructed the jury that the defendant was required to show that they had paid all of the rent, whereas there was no evidence introduced by the plaintiff to show what rent was due, and that the charge authorized the jury to find interest on the whole recovery, including rent, from Dec. 5th, 1889, date of demand for alleged damages to, or destruction of the property.

Fifteenth. The court erred in refusing to give the following charge asked by the defendant:

"That the board of directors of the defendant company was the sole power and body, under the law, authorized to make the alleged contract sued on, or authorize same to be made, and unless the jury find from the evidence that the board of directors of the defendant company had made or authorized the making of said alleged contract, then that the same did not bind said company."

Which charge the court refused to give, and to which defendant duly excepted.

Sixteenth. The court erred in refusing to give the following charge asked by the defendant:

"If the jury believe from the evidence that the plaintiffs, or any of them, knew that the property at the time of making the alleged contract was not insurable, and did not notify the alleged lessees of the fact, then plaintiffs acted in bad faith, and they could not recover."

And the refusal to give which charge the defendant, by its attorney, duly excepted.

Seventeenth. The court erred in refusing to give the following charge asked by defendant:

"If the jury believed from the evidence that the plaintiffs, or any person on their behalf, before the making of the said alleged contract, tried to get insurance on said property in question, and insurance had been refused, and they knowing the same did not so notify the alleged lessees, then the plaintiffs acted in bad faith, and they could not recover."

To the refusal to give said charge, defendant, by its attorneys, did then and there except.

Eighteenth. The court erred in refusing to give the following charge, which was asked by the defendant:

"If the jury believe from the evidence that insurance on the property in question was sought to be obtained at the usual places where such insurance would be applied for, and such agencies applied to representing companies insuring property in all parts of the United States, refused to insure the property, on the ground that such property was not insurable, and insurance companies would not insure such classes of property, then in the event of an agreement to insure was impossible of performance, and plaintiffs could not recover.

To the refusal to give such charge the defendant, by its attorneys, did then and there except.

Nineteenth. The court erred in refusing to give the following charge asked by the defendant:

"Persons dealing with a special agent are bound to take notice of the authority by which the special agent acts, and if the agent acts without the scope of his authority, such acts will not bind the company."

Argument.

First, third and fourth assignments of error on this Brief.

This action was in covenant, upon an instrument not the sealed instrument of defendant.

The court below overruled defendant's demurrer (found on pages 14 and 15 of the printed record) to the declaration (found on pages 2 to 8, inclusive, of the printed record) and amended declaration (found on pages 11 to 14, inclusive, of the printed record), the substance of which demurrer was that the declaration was in *covenant*, and that the said action in covenant would not lie, because the instrument sued upon, Exhibit A to declaration (found on pages 4 to 8, inclusive, of the printed record), did not appear to have attached thereto the corporate seal of the defendant company, and was not the *sealed* instrument of the defendant. An inspection of the copy of the instrument in the printed record, at page 7, will show that there is no language in the attempted executing of the instrument showing the attaching or annexing of a corporate seal to the instrument. The paper appears to be signed "Jacksonville, Mayport, Pablo Railway & Navigation Company, by Alexander Wallace, President," with the word seal enclosed in a scroll or scrawl opposite thereto, but the words corporate seal, or seal of the Jacksonville, Mayport, Pablo Railway and Navigation Company do not appear thereon, nor any indication of a corporate seal. As is well known, when the corporate seal is attached to an instrument, it is usual that the secretary or custodian of the seal says, in appropriate language, that he is the custodian of the seal, and attests the execution of the paper, and attaches the corporate seal. None of this appears on this paper, but only the ordinary bracket or scrawl, which was, in fact and in law, nothing more than the private seal of Alexander Wallace, who signed the paper.

The common law forms of action still prevail in the State of Florida, and an action of Covenant would only lie upon the sealed instrument of the party defendant. This, of course, is elementary, and well settled.

Even if this lease was treated as binding on the defendant, as having been made by its president, without the corporate seal being attached thereto, the proper action in common law proceedings upon such instrument would have been an action in Assumpsit, treating the said instrument as the contract of the defendant. We submit, therefore, that the demurrer to the declaration on this ground should have been sustained, and the case was tried in an erroneous form of action.

This has been expressly so decided by the U. S. Supreme Court and by the Supreme Court of the State of Florida.

See Bank of Metropolis vs. Guttschick, 14 Peter's Repts., pages 21, 29.

Mitchell vs. St. Andrews Bay Co., 4 Fla., pages 200 to 203.

Also Randall vs. Vechton, 19 Johnson Repts., page 60.

White vs. Skinner, 13 Johnson Repts., 307.

Taft vs. Brewster, et al., 9 Johnson, 334.

The lease introduced in evidence (found on pages 24 to 28 inclusive of the printed record) and what purports to be a certified copy (found on pages 29 to 34 of the printed record) do not contain and have not attached tnereto any corporate seal of the defendant company, nor is there any attestation by any custodian of the corporate seal of the attaching of the defendant's corporate seal thereto, the bracket or scrawl enclosing the word "seal" appears opposite the execution of the instrument by Alexander Wallace, president of the defendant company. Therefore, even if the exhibit to the declaration was sufficient, as a matter of pleading, to sustain the action of *covenant* on the introduction in evidence of the lease and certified copy thereof, it appearing that there was no corporate seal attached thereto, the court below should have rejected the said instrument, or dismissed the action brought in this form.

See Assignments 1 and 2, page 66 of Record.

Third Assignment of Error on Brief.

The Court below erred in admitting in evidence the alleged certified copy of the lease.

The plaintiff below in order to prove its cause of action, introduced in evidence what purported to be a certified copy of an alleged lease sued upon (found on pages 29 to34 of the printed record.) This certified copy was improperly admitted in evidence, because it appeared that the plaintiff had in his possession what purported to be the original lease, (found on pages 24 to 28 of the record.) A certified copy can only be introduced in evidence, under the Constitution of the State of Florida, where the party offering it has not the custody, or control of the original. The provision of the Constitution is as follows:

"Deeds and mortgages which have been proved for record and recorded according to law, shall be taken as *prima facie* evidence in the courts in this State without requiring proof of the execution. A certified copy of the record of any deed or mortgage that has been or shall be duly recorded according to law, shall be admitted as *prima facie* evidence thereof and of its due execution, with like effect as the original duly proved; provided it be made to appear that the original is not within the custody or control of the party offering such copy."

The original, in this case was in the possession and custody of the plaintiff, was produced by the plaintiff, Mary J. Hooper, (see page 28 of the record) and was identified by witness Buckman, who drew the paper. (See testimony of Buckman, pages 29 and 58 of the printed record). The witness Buckman, on page 58 of the printed record states, in answer to the question as to whether he did not say that this paper had the seal of the company on it, that it most emphatically did not; that this paper was the only original that he knew anything about; that if the seal of the company had ever been upon it, it could not have been erased, because it was a stamp seal.

The purpose of putting in the certified copy admitted in evidence was to attempt to argue that from the record of the words seal, opposite the company's name, it might be presumed that there was a seal on the original. It was error to admit this certified copy, where the original was produced, because the original is the best evidence, and the introducing of the copy permitted an argument thereon contradictory to the original itself.

Neither the original or certified copy lease should have been permitted to be introduced in evidence, becauuse there was no evidence or authority in the president to execute them.

If it be conceded that there was no error in admitting in evidence the alleged original and certified copy of the lease, put in on the grounds above stated, they clearly ought not to have been admitted without plaintiffs being first required to prove the authority of Alexander Wallace, who signed them, to execute these papers, in the name of the defendant company. This goes to one of the principle defenses in the case and objection was made to the introduction of these papers until this authority was duly proven. This is an objection of merit, and not simply to the form of the executing of the papers. The defendant was a railway company, as shown by its corporate name, and the instrument sued on is an alleged lease of a hotel with the covenant therein (found on page 31 of the printed record) that the defendant should use the property as a hotel property and keep the said hotel open for the accommodation of guests and the traveling public. The covenant sued upon is a covenant to procure insurance upon the property and under the instructions of the court below it was practically a covenant to insure. These are extraordinary provisions in the instrument. They do not come within the ordinary terms of any lease, and certainly are not ordinary terms of a lease of property to a railway company.

There was no presumption of authority in Alexander Wallace as president to execute for the defendant a contract of this character. The by-laws of the company (found on page 52 of the printed record, folio 105) distinctly provides that if the president, when so directed and empowered by the board of directors, should execute and sign for and on behalf of the company, all documents and writings authorized to be made and executed for and on its behalf. These instruments were introduced without any evidence that the corporate seal of the defendant had ever been attached to them, or that the directórs or stockholders had ever taken any action authorizing them, or that the president had any power or aurhority to make them.

It is submitted that the instruments were not binding upon the defendant company, on the face of them, and that the law is well settled, that unless a contract appears on the face thereof to be the corporate contract, that in order to establish the same as the contract of the corporation, it is not sufficient merely to show that it was signed by an officer of the corporation, but his authority to sign the same should be shown as a condition on precedent to admitting the written instrument in evidence as the contract of the defendant.

1 Morawetz on Corporations, Sec. 340, page 324.
2 Morawetz on Corporations, Sec. 617, page 584.
Koehler vs. Black River Falls Iron Co., 2 Black, 715, 718.

Therefore, in this case, the alleged original was not admissible, because it was not shown to be defendant's contract, nor any authority to make the same, was proven. The defendant had pleaded under oath, in this case, that the contract sued on was not its contract. This put the burden upon the plaintiff to show, when they offered the contract in evidence, that it was the defendant company's contract. This was not sufficiently shown by merely introducing a paper signed in the company's name, without showing the corporate seal thereon, or the authority of the persons who signed it to execute the same for the company. Neither of these requisites were complied with by the plaintiff, and the court below ought not to have permitted the introduction of the alleged original in evidence.

The alleged certified copy ought not to have been permitted to be introduced in evidence for the same reason, and for the additional reason that the said certified copy could only be introduced in the absence of the alleged original, which original was produced by the plaintiffs themselves, and had no corporate seal of the defendant thereon.

If a paper merely purporting to be signed in the corporate name may be introduced in evidence, without showing the authority of the party to execute it, who purports to have signed the corporate name thereto, and the corporation being forced on the mere provision of the paper to disprove the authority to sign the same, it would lead to the continuous attempted executing of contracts for corporations by unauthorized persons merely signing the name of the corporation. Under such practice any person might sign the corporate name of the company to an instrument on the mere production of the paper, force the company to defend against the same, and show a want of authority of the party to sign said corporate name to said instrument. This is reversing the burden of proof, and we submit that the court below erred in taking this view of the case, and permitting these papers to be used in evidence, and holding that they bind the defendant company.

Fifth and Sixth and Seventh Assignments of Error on Brief.

Evidence of the plaintiff's witnesses Roberts and Warriner:

The witness Roberts was permitted to testify to the fact of her renting this property from the witness Warriner, on the suggestion of Alexander Wallace, who was dead at the time this witness's evidence was given. Witness was also permitted to testify as to conversations she heard between the said Wallace, deceased, and plaintiff's attorney Challen. Witness Warriner was permitted to testify as to his transactions with witness Roberts. This evidence was improperly admitted. No statement of Wallace or Warriner could bind the defendant company, unless it was shown that the directors or stockholders of the company, in some corporate capacity had authorized these acts of Wallace and Warriner.

See pages 39 to 42 of record; also, Assignments of Error Eight and Nine, pages 67 and 68 of record.

The by-laws distinctly state that neither the president or secretary could make any contract without the authority of the directory. This was an effort to show indirectly some acts on the part of the said Wallace, president, and the said Warriner as secretary, in renting this property to the witness Roberts, as would bind the defendant company, but the evidence was clearly irrelevant, and ought not to have gone to the jury, unless these transactions were shown to have been brought to the knowledge of the directory of defendant, or acted upon by the stockholders in some corporate meeting.

One of the strongest objections, however, to this testimony was the fact that Wallace, through whom plaintiffs claim to have made this contract with defendant, was dead, and of course, the defendant could not have the benefit of his testimony in reply to such evidence.

The Acts of Congress, and Statutes of the State of Florida distinctly prohibit parties in interest to testify as to transactions with persons deceased. In this case, plaintiffs were seeking to establish by transactions with Wallace through whose contract they proposed to bind the defendant, that the property involved had been subsequently rented by Wallace and Warriner for the defendant. Wallace was the president of the defendant company, but it is not shown that he was ever authorized by the defendant to make any of these transactions testified to for defendant. If the Act of Congress and Statutes of the State of Florida prohibiting testimony as to transactions with persons deceased does not in terms cover this evidence, they certainly do in spirit, and the fact of Wallace's death present a strong reason why some authority to make this alleged contract for defendant should have been shown by the plaintiff, before defendant should be held bound by this paper or by these alleged transactions, of the said Wallace with the said witness Roberts or the plaintiff. No such authority was shown, nor any knowledge on the part of the directory or stockholders of the transactions, and we submit the evidence of Roberts and Warriner ought not to have been admitted to bind the defendant in this case.

The witness, Warriner, in his testimony (page 42 of printed record) distinctly states that the books of the defendant and the minutes of the directors show no action whatever upon the part of the directors of the company in relation to this hotel or this contract; that he was secretary and kept the minutes; that he never received any direction from the company or board of directors to receive rent for the hotel or do anything in regard to it, so that it appears that both the said Wallace, and the said Warriner acted in this matter without any positive action or authority of the defendant company.

See Section 1095, Revised Statutes of the State of Florida, as follows:

"No person, in any court, or before any officer acting judicially, shall be excluded as a witness by reason of his interest in the event of the action of proceeding, or because he is a party thereto: Provided, however, that no party to such action or proceeding, nor any person interested in the event thereof, nor any person from, through, or under whom any such party or interested person derives any interest or title by assignment or otherwise, shall be examined as a witness in regard to any transaction or communication between such witness and a person at the time of such examination deceased, insane or lunatic, against the executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, or survivor of such deceased person, or the assignee or committee of such insane person or lunatic; but this prohibition shall not extend to any transaction or communication as to which any such executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, survivor or committeeman shall be examined on his own behalf, or as to which the testimony of such deceased person or lunatic shall be given in evidence."

Eighth Assignment of Error,

on brief; 12th on record.

The refusal of the court to permit the defendant to introduce in evidence its by-laws, to show want of authority in Wallace to execute the lease.

We have argued above that the burden and duty was upon the plaintiff in the first instance to have shown some authority in Wallace to make this lease in the name of the defendant company, so as to bind the defendant, before the lease could be put in evidence, or before the court would hold that defendant was bound by the lease. But at the trial in the court below the defendant company did not stop at making its objection to the introduction of these papers and the evidence of the witnesses as to the acts of Wallace, until it was shown that he was authorized to act for defendant, but the defendant attempted to introduce positive evidence to show that he had no authority to make this lease, or to enter into any other transaction of this character to bind defendant without the positive previous action of the directors authorizing the making of the lease, or any transaction thereunder. For this latter purpose, defendant offered in evidence its by-laws (found on pages 49 to 57 of the printed record), but the court refused to permit the introduction of the said by-laws. This, we submit, was clearly an erroneous ruling. No matter what view the court might take of the question as to whether the defendant was bound by this alleged lease, the defendant ought to have been permitted to introduce evidence upon this point. The action of the court below in effect prevented the defendant from introducing testimony to show that the lease was unauthorized and was not its deed.

The president has no power to make contracts for the company, action of directors is necessary.

See Cook on Stockholders (2d edition). See 716 and notes.

Also see section 712.

The defendant, by its first, second and fifth pleas had distinctly put in issue, and the plaintiffs had joined issue upon these pleas, that the contract sued upon was not the contract of the defendant; that it had never covenanted and agreed, as declared by plaintiff, and that it had never acted under the lease or become liable to the plaintiffs thereon.

To sustain these issues the defendant sought to show what its by-laws required in the matter of contracts by defendant, and how and by whom they should be made. This was relevant and legitimate proof upon these questions, but the court excluded the testimony all together, and gave defendant no opportunity to show whether or not it was bound by this contract. The by-laws directly bear upon the question showing the powers and duties of the president and of the directors, and what the records of the company should show. Especially relevant to these matters are Article 2, Section 1 (found on page 52 of the printed record,) stating the duties of the president. Those dutiesare that he shall have the general management and supervision of the operation of road of said company, and the geneaal business thereof, subject, however, at at times, to the control of the board of directors. *He shall, when so directed by the directors execute and sign for, and on behalf of the said company, all documents and writings authorized to be made and executed for and on its behalf.*

Under section three, the secretary is required to keep the minutes of all the actions of the directors and stockholders.

Under section five, page fifty-three of printed record it is provided that the board of directors shall manage all the affairs of said company, and at all times direct and control the same, and have supervision and control over all the departments thereof; and in section seven they are specifically given power in detail over all affairs of the company, among others to make rates for the carriage of passengers and property over its lines of road, and enter into contracts, or authorize the same to be entered into by any one of the officers of said company, or other persons, by, for and on its behalf, as they shall deem best for the interests of said company. Again to authorize its president to execute, and sign the writings and instruments to be executed and signed for and on behalf of said company, and to have affixed the corporate seal thereto; to contract for the purchase of land, right of way or ways for the lines of its road; to direct and prescribe the location of the lines of its road; to have power to let all contracts for the building of its road or any part thereof, to sell the lands belonging to the company, etc.

The laws of the State of Florida provide for the corporation making by-laws to control these matters.

See copy of laws at end of this brief.

It thus appears from the reading of these by-laws that the general business of the defendant was the construction and operating of lines of railroad, and that the business was under the control of the directors of the company; that the president only had authority to execute contracts for the company, and the corporate seal could only be attached to such contracts under the authority and direction of the said board of directors.

These by-laws are more stringent in limiting the powers of the President than the ordinary rules controlling corporate action. The President, under these by-laws, has less authority than is ordinarily given to the president of a corporation, and is more directly under the control of the board of directors. All of the corporate business has to be transacted by the board of directors, or with their specific authority.

In the case at bar the President undertakes to sign the corporate name to a contract, not within the business purposes of the defendant company. The defendant company is a railroad company and, as its by-laws show, its business is to construct and operate railroads, it has no power under laws of Florida to lease and operate a hotel. The president undertakes to sign its name to a lease of a *hotel*, and to obligate it to use and run the property as a hotel and to procure insurance upon the said property and keep thesame insured, and, as construed by the court in this case, to become the insurer of the property against loss by fire. These certainly were extraordinary contracts, that even under the usual rules controlling the powers and duties of a president of a corporation, he could not make for the corporation, and certainly under these by-laws the specific authority of the board of directors must have been obtained to authorize the making of this paper, so as to bind the defendant. The contract was clearly *ultra vires* and outside the purposes of this defendant company. The by-laws did not contemplate the running of hotels by the defendant company, and even if the company had power to make a contract of this character binding itself, it is clear from its by-laws that the stockholders of this company could not, and their property could not be held liable for such an extraordinary contract as this merely upon the signature of the president. Some corporate action should have been taken by the stockholders authorizing or ratifying, or the board of directors must have directed and empowered the president to execute and sign the contract for and on behalf of the company, as provided in the by-laws. But the court below refused to permit the defendant to make this defense at all and refused to permit the defendant to show what its by-laws did require.

Every person making a contract with the officers of a corporation are held and deemed to make their contracts in view of the charter and by-laws of the company. These by-laws are a part of the being of the company, and enter into every contract made by it, because the laws of Florida authorized it to make said by-laws to control its business.

Ninth Assignment of Error,

or brief, or 11th in record.

The court erred in refusing to permit the defendant to introduce in evidence the minutes of its directors and stockholders meetings, to show want of authority in president.

The stockholders only give consent to contracts of the corporation when made in the manner prescribed by the by-laws, and when within the business purposes for which the company is incorporated.

We submit the rejecting of the by-laws and of the minutes of the company, to show want of authority in the president, was error, for which this case should be reversed. Of course, the minutes of the stockholders and directors was relevant testimony and ought to have been admitted, for previous authority was necessary to authorize this contract. The by-laws, Section 3 of Article 2, require the secretary to keep the minutes of the proceedings of the directors and stockholders. These minutes are the highest and best evidence of the action of the directors and stockholders, and they were clearly admissible in evidence to show that neither the directors or stockholders had ever authorized or ratified this alleged contract sued on, which the president, Wallace, had attempted to sign in the name of the company.

These minutes, as testified to by the witness Warriner, showed that no action had ever been taken by the directors or stockholders upon this alleged contract; that nothing appeared therein in relation to the contract, or this hotel property; that the said minutes contained nothing authorizing the president to make or execute said contract or in such contract, or to enter into said lease or in such lease, and contained nothing to show that the directors or stockholders recognized this contract or lease. These minutes showed the regular meeting of both the directors and the company and all of its business in full, and ought to have been admitted in evidence.

The offer to introduce the minutes and to make this proof as to what the books contained, is found on page 49 of the printed record, all of which evidence was rejected by the court below, and the ruling of the court excepted to.

The offer to introduce said by-laws and the ruling of the court thereon are found on pages 56 and 57 of the printed record, to which ruling the defendant excepted.

This minute book is the evidence of directors action. Cook on ~~vs.~~ Stockholders (2d edition). See 714.

Tenth and Eleventh Assignments of Error.

The court's charge that the contract was a contract of the company.

The court, in its charge, distinctly stated to the jury that this contract was signed by the defendant, and that the certified copy and duplicate copy and duplicate copy put in evidence, were contracts of the defendant railway company, and that they bind the company.

We submit that the court erred in charging the jury and deciding that this paper sued on was the contract of the company, and that the company was bound by it.

The defendant had pleaded, as a matter of fact, that the paper sued on was not its deed, and that it had not contracted, as stated in the declaration ; and these were issues of fact to be tried by the jury on the evidence.

The court below erred in treating these as issues of law, and deciding that the company did make a contract and in taking these matters from the jury.

The question of fact, requiring proof of course, should be tried and determined by the jury, unless the court holds that there is no evidence whatever authorizing the finding of the jury, other than the issue determined by the court. In this case evidence was introduced as to the executing of the instrument and some other evidence as to what was claimed to have been done under the instrument, and this question should have been submitted to the jury.

We submit, however, if the question is one proper to be determined by the court, that the court erred in instructing the jury that the executing of the contract had been sufficiently proven, and that this was the contract of the defendant and that the defendant was bound by it.

We have discussed, under the assignment in reference to the introduction of these contracts, the reasons why the defendant was not shown to have executed the contract or to be bound by it. The contract did not have attached to it the seal of the company. While we admit that a corporation may be bound by a contract made by its agents without having its seal attached, that law only applies to the case where it is shown that those agents were authorized to make such contracts for the company and to bind the company by such contracts. In the case at bar the contract was not one that a railway company would ordinarily make. It was outside the business of the company, and no authority is shown for the making of same by the said Wallace on the part of the defendant company. The court, in effect, held that because Wallace was president of the company, therefore the company was bound by this contract, signed in its name by Wallace. We submit that the law does not go this far, and under the by-laws of the defendant in this case, Wallace had no authority whatever, as president, to make such contract without the action of the directors or stockholders. This being true, the court erred in charging the jury, without further or other proof than presented in this case, that this was the contract of the defendant, and the defendant executed it, and that defendant was bound by it.

The bill of exceptions nowhere shows a single word of proof that the directors or stockholders, acting at stockholders' meeting, or any other corporate capacity, had ever authorized or recognized this paper, and we submit that the court was not warranted in its direction to the jury, the subject matter of this assignment of error.

See 1 Morowetz on Corp., Sec. 511.

Couro vs. Port Henry Iron Co.,12 Barb, 27, 63.

Titus vs. Cairo & R. R. Co., 37 N. J. Laws, 98, 102.

This contract was ultra vires.

This was an agreement or lease signed by the President of the defendant to rent a beach hotel at Burnside Beach, as stated in the lease. The agreement provided for the using and operating of the property as a hotel, by the defendant. The particular covenant sued on provided for obtaining and keeping up insurance on this summer or beach hotel. The title of the defendant shows that it was a railway company; the by-laws of the company offered in evidence show that its business was the constructing and maintaining of lines of railroad. The powers of the president and directors were confined to the constructing and operating of lines of railroad. Nothing appears in the record to show that this defendant company was organized or authorized, or that its stockholders invested their money to run hotels or to procure insurance on hotels; but the minutes and the by-laws show just the contrary. This contract was not a contract of the defendant company, because it was *ultra vires.* The president and officers of the corporation cannot make a contract binding upon the defendant company, which its stockholders, or its property, become ltable to pay so entirely beyond and outside of the business purposes of the company.

See Laws of Florida at end of brief.

See Pearce vs. Madison R. R. Co., 21, How. Rep., 441.

Thomas vs. R. R. Co. 101, U. S., 71, 82.

Twelfth, sixteenth, seventeenth and eighteenth assignments of error on beief, or 14 and 17 of record.

The court erred in charging that the defendant was bound in any event to obtain insurance at any cost or be liable for all damages plaintiff might sustain by loss of property by fire.

These assignments of error present for review by this honorable court the law of this cause, as given by the court, mentioned in assignment of error Number 12, and the law, as asked by the defendant to be charged and which the court refused to charge in reference to the liability of defendant to obtain the insurance mentioned in the lease sued on, and the said assignments of error may here be considered and treated together in order. The law, as charged by the court, and that asked to be charged by the defendant, and refused by the court, presents distinct views of the construction of this case, and the duty and liability of defendant in performing the same.

The court, in its charge (found on page 60 of the printed record) covered by assignment of error 12 in this brief, and assignment of error Number 14 in the printed record (pages 68 and 69 of the printed record) instructed the jury that it was incumbent upon the defendant to insure this property, if it were possible under any circumstances, *by the payment of any premium whatever*, if it was possible to obtain this insurance anywhere, at any cost, the defendant was bound to do so, and that the defendant was bound to show that it could not obtain insurance anywhere, from any person, at any cost, in order to relieve itself of this liability.

The court in this charge further instructed the jury that if the defendant did not obtain the insurance, the defendant became liable to pay to the plaintiff the value of the said building, up to the amount of said insurance.

This charge was too broad and sweeping in stating the liability of the defendant. It did not make any exception of any sort in fixing this liability or fixing the obligation of the defendant to obtain said insurance.

Under this charge, it made no difference whatever, whether it was shown that both parties knew at the time that the insurance could not be obtained, or that the lessors knew that it could not be obtained. This charge does not make any exceptions as to what reasonable effort should be made on the part of defendant to carry out the contract, but holds them liable, absolutely, in any and all events, for the full amount of the said insurance. The charge, we submit, places too great a liability upon the defendant, and is not the true construction of the principle, and it places the *burden* on the defendant of showing *that nowhere in the world, at any premium whatever, could it obtain this insurance, and that it had tried at every place in the world where insurance could be obtained, at any price, to procure insurance.*

The plaintiff in error in this honorable court submits that the correct proposition of law controlling its liability, if it is bound by this contract, and the correct construction of the contract itself, is that if the defendant company should make such a reasonable effort, at such places and on such terms to obtain this insurance as the parties must have had in mind when the contract was made, to-wit: the usual places, on the usual terms, that plaintiffs themselves would apply for such insurance.

That every contract must be construed according to what the court finds was in the minds of the parties at the time they made the contract to carry out their obvious intent; that the plaintiffs below could only expect on such a contract that the defendants would make every reasonable effort to get this insurance that plaintiffs themselves would make, under like circumstances; that this was known to the plaintiffs, and upon this the contract was based.

Chicago, M. & Ry Co. vs. Hoyt, 149, U. S., 1 to 15.

Bliven et al. vs. New England Screw Co., 23 How. 420, 432.

Renner vs. Bank of Columbia, 9 Wheat., 588.

2. Parsons on Contracts, page 656, bottom page 810.

That if the defendant did all that it could be reasonably be expected to do, to perform the contract, and that the plaintiffs, at the time of the making of the contract must have expected to be done, nothing more can be required of defendant in performing said contract. That all the surrounding circumstances, to-wit, the location and character of the property, and the place and places where the owners of property would make application for insurance, and the reasons why defendant's officers could not get the insurance, should be taken into consideration, in ascertaining whether by reasonable effort the insurance could be obtained, and whether or not the defendant's officers had made such reasonable effort to obtain same.

If this honorable court is satisfied from an inspection of the record that reasonable effort was made by the defendant's officers to obtain this insurance, at all of the insurance offices in the city of Jacksonville, the nearest town to the property in question, and lying in the same county, and that such applications were made to agents doing business in various parts of the world, and these applications were refused, on the grounds as stated by the witnesses, that the property was not insurable, and was not rated for insurance by any of the companies, on account of its being an unprofitable hotel, situated at a beach distant from any town; then, under these circumstances, the court below should have instructed the jury that if they found these facts, that the defendant had made reasonable effort to perform the contract required by it, and that this was all that was obligated to do under the contract, the court will not construe the contract to mean that one of the contracting parties agrees to do some thing absolutely over which he has no control, unless the language of the contract, viewed in the light of the surrounding circumstances, admits of no other construction.

This court, in the case of Chicago, Milwaukee, etc., Ry. vs. Hoyt, says, (149 U. S. Rept., 1 to 15) "where the event is of such a character that it cannot be reasonably supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be bound by the general words which, though large enough to include, were not used with a reference to the possibility of the particular contingency which afterward happens."

In that case, although the Covenant in the lease, by its terms apparently bound the plaintiff in error, in case the total amount of grain received at the elevator fell short of 5,000,000 bushels on an average for each year, to pay the sum of one cent per bushel, for the amount of such deficiency; still the court held that they would not construe that as an absolute obligation, in any event, to pay one cent per bushel, where the failure literally to receive at the elevator 5,000,000 bushels occurred on account of the action of third parties in allowing grain to remain, which was beyond the control of either the lessor or of the lessees, and the railway company would not be held liable on its guaranty. So in this case, it is more reasonable that the intent of the parties to the contract was, that if insurance could be obtained on this property at a reasonable rate in reliable insurance companies, doing business in Florida, that the defendant company would obtain such insurance, than to hold as the court did, that defendant was bound to obtain the insurance, in any event, by paying any price any where that it could be obtained, and to show that it could not obtain the insurance at any price, anywhere from any persons. The former is the correct view of this subject, on the construction of the contract, and the evidence shows that the defendant performed its contract, if this is the correct construction. Its officers did apply to at least four insurance agents in Jacksonville, all of whom testified, as shown by the bill of exceptions in the record that they refused the insurance on the ground that the insurance companies would not rate for insurance property of this character.

The other view of this feature of the case is that even if it be construed that the defendant did not perform the contract, by making the reasonable effort, that it did, to get the insurance, that then the contract was impossible of performance, within the legal meaning of that term. A contract is impossible of performance which a party cannot perform, when he makes every reasonable effort within his power to perform the same. In this case, the evidence of the witness Dawkins, (pages 42, 43 and 44 of the record) shows that he represented insurance companies that did business all over the United States as well as all over the State of Florida. He testified that both the plaintiff's attorney, and Mr. Solary, whom he presumed represented the defendant company, applied to him for insurance on this property, and that he refused such insurance, on the ground that all the insurance companies had established the rule that they would not insure unprofitable property that were not paying investments, and that hotel properties in Florida had been considered as unprofitable and uninsurable with the insurance companies; that his companies refused to take the risk at all; that the property was without rating.

In answer to the inquiry of the court, he stated, that if a tender had been made of a premium of $6,000 or $8,000 for a year, he would not have insured the property; that no premium would induce the companies to insure this class of property.

The witness Haynes (on page 45 of the printed record) represented companies doing business all over the United States, and foreign companies who wrote business all over the world, that these summer hotels, of the class of property in question, were on the prohibited list, and could not be insured.

The same statement appears on page 23, as the evidence that the witness Norton would give if present.

It appears on page 47 of the record, the evidence of the witness Williams, that an application had been made for insurance on this hotel by the plaintiffs to one Wyatt, the predecessor of the witness in the ownership of his insurance business, that Wyatt send off an application to an outside company and endeavor to get insurance on this property when the good companies would not rate it, and the records of the office did not show that he had been able to get any such insurance.

It appeared from the evidence of the witness Nichols (page 48 of the record) that the plaintiff Hooper was endeavoring to get insurance on this property from Wyatt, and that he, defendant, heard plaintiff state to Wyatt, or make remarks to the effect that insurance could not be had on this property.

It appears from this evidence that no company doing business in Florida would insure the property; that companies doing business in the United States and foreign companies had refused to even rate it for insurance, and that it was in the prohibited list, as the witness termed it, that the plaintiff and plaintiff's attorney had, at one time, applied for insurance, and the plaintiff, Hooper, had even gotten Wyatt to send off an application to some outside companies, but it was impossible to get any insurance through these channels upon the property.

It thus appears that the defendant did make every reasonable effort to get insurance, and that it was not possible at the usual places in the city of Jacksonville, where every person would apply for such insurance, to obtain the same.

It further appears that the plaintiff, Hooper, and his attorney, Challen, knew that this property was not insurable.

The rule stated in 2 Parsons on Contracts, page 656, bottom page 810, is as follows:

"When the defense against an action on contract is performance, the question sometimes arises whether the performance relied upon has been of such a kind as the law requires. The only general rule upon this point is, that the performance must be such as is required by the true spirit and meaning of the contract, and the intention of the parties as expressed therein."

The impossibility of performance which will excuse a contracting party usually occurs in cases where at the time the contract was made there was no way of carrying it out. Such cases are divided into two classes: Impossibility on the face of the agreement, or or known to both parties at the time, which avoids the contract, because there is no real consideration; and second, impossibility at the time of the contract not known to either party, which may avoid the contract on account of mistake. Still another cause of impossibility of performance, is where the impossibility is known to one party only; and where it is known only to the promisee it cannot be accepted with the expectation that it will be carried out, and therefore the promise is not binding.

See Lawson on Contracts, Section .419.
Leake on Contracts, Section 692.

Where the thing agreed upon to be done is impossible before the agreement was made, such impossibility prevents a contract from ever having arisen and does not operate, as an impossibility arising subsequent to the contract, will sometimes operate as a form of discharge.

See Lawson on Contracts, Section 214.

A promise is not enforcable where it is to do a thing so impossible that it can form any real consideration. This may occur where the performance of the promise is impossible in law, or physically impossible. A promise by A, without authority of B, to discharge a debt due to B, is a performance that is impossible by law, for no one without requisite authority can release a debt due to another.

See also Jones vs. U. S. 96 U. S., 29.
Clifford vs. Watts. 5 C. P., 588.

Brick Company vs. Pond. 38 Ohio St., 65.
Cook vs. Andrews. 36 Ohio St., 178.
Dubuque S. W. R. Co. vs. Ced. Rap. & Mo. Riv. Ry. 66 Iowa, 366.

"Practical impossibility, unknown to the parties when they entered into the contract may avoid the contract on the ground of mistake."

See Section 101, Lawson on Contracts.

In the case at bar the covenant sued on provided, not that the lessee, defendant company, should itself insure the leased property, nor become responsible for the amount of said lease. The covenant provided that the lessee covenants and agrees to insure the said premises in the sum of $6,000, in a *good and responsible insurance company against loss by fire.*

This was, in effect, an agreement to obtain another, to-wit: a good and responsible insurance company to make a contract, and either the plaintiff knew, from the application he had made for insurance, that this could not be done, or the parties mutually acted on the mistake that insurance could be made in a good and responsible insurance company. In either event, the lessee was excused from doing more than making a reasonable effort to get the insurance, and thereby demonstrating that it was practicably impossible to do so.

The lessee, defendant company, never made itself an insurer of this property, but this is the effect of the ruling of the court below.

The charges asked by the defendant and refused by the court on this subject should have been given.

The defendant requested the court to charge that if the plaintiffs knew that the property, at the time of making of the contract was not insurable, they could not recover. This charge the court refused to give. In this the court clearly erred, as is well stated by Lawson on Contracts: "Where the impossibility is known only to the promisee it could not be accepted with the expectation that it will be carried out, and therefore the promise is not binding." And about the same proposition in another form: "There is no contract on a subject where there is no good and responsible insurance company in which the insurance can be obtained, and the promisee knows it. The thing to which the parties are contracting does not exist, and the promisee does not expect this covenant to be carried out."

See Leake on Contracts, Sections 692, 590, 593, 594, 597 and 281.

In this case the evidence shows that the plaintiff had himself made application to one Wyatt for insurance, and had sent off an application out of the State, because the insurance could not be obtained in any company in Florida, and the witness, Nichol, testified that he had heard the plaintiff state that insurance could not be obtained on this property.

It further appears that the plaintiffs' attorney had made application for insurance and had been refused. There certainly, then, was evidence tending to show that plaintiff below knew that this insurance could not be obtained, and that was an issue that should have been submitted to the jury under this charge.

The same argument applies to the assignment number 18th, in reference to plaintiffs' having tried to get insurance and having been refused. This was one of the exceptions to the general rule requiring performance, which the court should have given to the jury when charging the jury upon the subject of defendant's obligation to perform the contract.

The defendant also asked the court to charge the jury as stated in assignment number 18, that where the insurance was sought to be obtained at the usual places where such insurance would be applied for, and was refused on the ground that the property was not insurable; and where it appeared that insurance companies made a rule not to insure this class of property that the defendant was excused from any further performance of this covenant, and that this was a sufficient showing of the impossibility of literally performing this covenant.

The plaintiff in error insists that this was a correct statement of the law, and should have been given by the court to the jury. It is a question for the jury to decide on the evidence as to what effort had been made to perform the contract, and how far it was practical to perform it, and the court should have given this as the law of the case to them. I submit the court erred in not giving this charge.

When the parties entered into this agreement, it was only expected and contemplated by the plaintiffs themselves, that if the insurance could be obtained in a good and responsible company, at the usual places and terms, then the plaintiffs should expect such insurance. It certainly was not in the contemplation of the parties, as the court instructed the jury that the defendant company should pay any price demanded anywhere in the world, that this insurance could be obtained, the covenant being to obtain *insurance in a good and responsible* company. It is not reasonable to suppose that the contract contemplated the payment of an exorbitant rate, or application at unusual places, for it is not reasonable to presume that the parties would get insurance in a good and responsible company on less terms, but rather that the company would not be good and responsible, to whom such enormous rates would have to be paid, or to find whom the defendant would have to make unusual search in unusual places.

Defendant was not responsible, in any event, for the amount of the insurance, not having contracted as an insurer.

The court in its charge directed the jury that unless the defendant proved that it could not obtain this insurance anywhere from any person, at any price, it was liable to the plaintiff for the value of the property up to the amount of said insurance, provided for said covenants.

The defendant, if it is held that it is bound by this lease or contract to the defendant to insure the plaintiff against loss of this property by fire, contracted if same could be done on reasonable efforts to obtain insurance for plaintiff in a good and responsible company. The only pecuniary liability it assumed, on a covenant of this kind was to pay the costs of obtaining such insurance. It became liable to the plaintiff for the amount of premium of cost of insurance, not for the insurance itself.

There was no consideration to the defendant for insuring the property; no premium was paid to it by the plaintiffs for assuming this risk. It contracted as a part of its rental to pay the cost of obtaining the insurance. This is the reasonable construction of the contract. Having received no consideration for insuring the property, and not having contracted itself to insure it, the court erred in charging the jury that it became responsible itself for the value of the property, if destroyed by fire. This was making a new contract for the parties that they themselves would not make.

This question was raised also on the demurrer to the declaration that the same did not state a cause of action against the defendant, which demurrer was impoperly overruled by the court. The charge of the court, as to the damages, therefore, was erroneous.

See Lancaster Mills vs. Merchants, &c., Co. ,89. Tenn., Rep. 1.

Thirteenth Assignment of Error on Brief, 15, on Record.

The court authorized the jury to find the value of the property from their own experience.

The court charged the jury that they could appeal to their own experience and knowledge, from having had houses built themselves, as to what would be the probable cost of a house of the character of the one destroyed, etc., by fire, and authorized them to reject the evidence of witnesses which they deemed absurd or unpractical. The court authorized them to exercise their own knowledge as to what amount it would take to build the house in question, and to measure the testimony by their own judgment, opinion and experience. This charge presents an erroneous view of the province of the jury in waiving testimony. They should decide a cause according to the testimony, taking all the testimony together, but they are not authorized to apply to their personal knowledge and experience of the value to ascertain the value of the property destroyed.

If the law was as stated in this charge, the jury could and would rely more upon their own outside knowledge than upon the testimony given from the witness stand. The charge does not confine the jury to deciding the cost, according to the evidence, but under the law given by the court, to introduce a foreign element into their considerations, to-wit, their own personal knowledge and experience of values, and the court erred in giving said charge.

See Proffatt on Jury Trials. Secs. 369, 371, 372.
Benjamin vs. Hillard. 23 How., 49.

Fourteenth Assignment of Error, on Brief, 15th and 16th on Record.

The charge as to rent.

The court charged the jury that they could find for the plaintiff the amount of rent claimed by them, unless defendant showed that it had been paid. This was erroneous. There was no evidence in the case showing what amount of rent was due, if any, nor showing for what time the defendent owed rent, if any. The mere introduction of a lease was not sufficient to put the burden upon the defendant to prove it had paid rent. The defendant's fifth plea was that it had never rented or had possession of the property, or become liable to the plaintiffs, in any way, upon the said lease. The plaintiffs took issue upon this plea, and it was incumbent upon plaintiffs to prove every fact necessary to show the liability of the defendant, both for rent and upon the covenant, to procure insurance. The court should have charged that the plaintiffs should show during what time defendants occupied and possessed the property, and what amount of rent remained due and unpaid, but the charge of the court reversed this proposition, and required the defendant to show that it had paid the rent.

Fifteenth Assignment of Error on Brief, 17th on Record.

The contract was not authorized by the board of directors of the defendant company.

The defendant asked the court to charge that under the by-laws the board of directors must have authorized the making of this contract to bind defendant company. This the court refused to give, for the same reasons that it rejected the introduction in evidence of the by-laws and minutes of the defendant.

I have discussed above the effect of the by-laws and the necessity for the contract to have been authorized by the directors. The same argument applies to all this charge. The evidence ought to have been received and this charge ought to have been given on that evidence and the same question is here raised upon the action of the court in refusing this charge, as is raised in the argument above on the rejection from the evidence of the by-laws and minutes of the defendant company. The contract was one that required the authority of the directors and stockholders, if there had been no by-laws on the subject, and the by-laws distinctly require such action, to make the contract binding upon the defendant.

The foregoing are the assignments of error, upon which the plaintiff in error insists that the judgment of the court below should be reversed.

By the judgment of the court below the defendant is held liable for a large amount of money, for which it received no consideration whatever, and upon an unusual and extraordinary contract. It does not seem to have ever been acted upon in corporate meeting. All that the defendant, if it made the contract, or had the use of the building, got out of the contract was a few months' use by the witness Roberts of this house as a hotel. She claimed to have turned in to the secretary accounts claimed to be due here in payment of her rent.

It thus appears that the defendant company through its directors, or by its stockholders, never assented to this lease, and never received any benefit from it, and the contract not being one by the defendant to itself insure the property, and every reasonable effort having been made to get insurance, and the evidence tending to show that the plaintiffs and their attorney knew that this provision of the lease could not be carried out, I submit that on the law of the case, judgment should have been for the defendant below, the plaintiff in error in this court, and that the judgment should be reversed for the reasons herein above stated:

J. C. COOPER,
Attorney for Plaintiff in Error.

Provisions of the laws of the State of Florida, in reference to powers of corporation.

Sec. 3. Every corporation, as such, shall have power: First. To have succession by its corporate name for the period limited in its articles of corporation, and when no period is limited, for twenty years; second, to sue and be sued, complain, defend, plead and be impleaded in any court of law or equity; third, to contract and be contracted with, and make and use a common seal, and alter the same at pleasure; fourth, to hold by mortgage, or otherwise convey such real and personai estate as the purposes of the corporation shall require, not exceeding the amount limited in its articles of incorporation; also to take, hold and convey such other property, real, personal or mixed, as shall be necessary requisite for such corporation to acquire in order to obtain or secure the payment of any indebtedness or liability belonging to the corpora tion; fifth, to appoint such subordinate officers and agents as the business of the corporation shall require, and to allow suitable compensation, *sixth, to make by-laws not inconsistent with the laws of the State, for the management of its property, the regulation of its affairs, and for the transfer of its stock.*

McClellan's Dig. Laws of Fla. page 328, sec. 3.

Sec. 4. "There shall be a board of not less than three nor more than thirteen directors of every corporation formed under this chapter, to manage its affairs, and said directors shall be chosen by a majority of the votes of the stockholders voting at such election, in such manner and for such time as may be prescribed in the by-laws of the corporation, and they may, and shall, continue to be directors until others are elected in their places."

McClell. Dig. Laws of Fla., page 275, Sec. 4.

Sec. 5. "The directors shall appoint one of their number president. They may also appoint a vice-president, treasurer and secretary, and such other officers or agents as shall be prescribed by the by-laws.

McClell. Dig. Laws of Fla., page 276, Sec. 4.

Sec. 10. "Every corporation formed under this chapter shall be empowered—"

"1st. To cause such examinations and surveys for the proposed railroad or conal to be made as shall be necessary to the selection of the most advantageous route, and for such purposes by its officers, agents and servants, to enter upon the land or water of any person for that purpose."

"2d. To take and hold voluntary grants of real estate and other property as shall be made to aid in the construction, maintenance and accommodation of its road or canal, but the real estate received by voluntary grant shall be held and used for the purposes of such grant only."

"2d. To purchase, hold and use all such real estate and other property as may be necessary for the construction and maintenance of its road or canal and the stations and other accommodations necessary to accomplish the objects of its incorporation, and to sell, lease or buy any land or real estate not necessary for its use."

"4th. To lay out its road or canal, not exceeding two hundred feet in width, and to construct the same, and for the purpose of cuttings and embankments, and for obtaining gravel and other material, to take as much land as may be necessary for the proper construction, operation and security of the road or canal, or to cut down any trees that may be in danger of falling on the road or into the canal, making compensation therefor as provided in this section for land taken for the use of the company."

"5th. To construct their road or canal across, along, or upon, or use any stream of water, water-course, street, highway, or canal, which the route of its road or canal shall intersect or touch; and whenever the track of any railroad or canal shall touch, intersect, or cross any road, highway or street it may be carried over or under such railroad or canal, as may be found most expedient for the public good; and in case any embankment or cut in the construction of any railroad or canal shall make it necessary to change the course of any highway or street, it shall be lawful for any company to construct such road or canal so to change the course or direction of any road, highway or street."

"6th. To cross, intersect, join or unite its railroad with any other railroad heretofore or hereafter to be constructed at any point in its route or upon the ground of any other railroad company, with the necessary turnouts, siding, and switches, and other conveniences, and furthermore in the object of its connections, and every company whose railroad is or shall be hereafter intersected by any new railroad can unite with the owners of such new railroad forming such intersections and connections, and grant the facilities aforesaid, and if the two corporations cannot agree upon the amount of compensation to be made therefor, all the points and matters of such crossing and connections, the same shall be ascertained by commissioners appointed by the court as is provided in this chapter in respect to acquiring real estate; and no company which shall have obtained the right of way and constructed its road at the point of intersection before the application for the appointment of commissioner may be made, shall be required to alter the grade or change the location of its road."

"7th. To take and convey persons or property over their railroad or canal, by the power or force of steam or animals, or by any mechanical power, and to receive compensation therefor and do all the business incident to railroad or canal business."

"8th. To erect and maintain all convenient buildings, wharves, docks, stations, fixtures and machinery for the accommodation and use of their passengers and freight business."

"9th. To regulate the time and manner in which passengers and property shall be transported, and the compensation to be paid therefor."

McClell. Dig., Laws of Fla., pages 277, 278, 279, sec. 10.

J. C. COOPER,
Att'y for Plaintiff in Error.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1895.

NO. 80.

THE JACKSONVILLE, MAYPORT, PABLO RAILWAY AND NAVIGATION COMPANY
VS.
MARY J. HOOPER, ET AL.

ERROR TO CIRCUIT COURT UNITED STATES, NORTHERN DISTRICT OF FLORIDA.

BRIEF FOR DEFENDANTS IN ERROR.

JAMES R. CHALLEN,
Counsel.

Supreme Court of the United States.

THE JACKSONVILLE, MAYPORT & PABLO RAILWAY & NAVIGATION COMPANY,

vs.

MARY J. J. HOOPER, AND H. H. HOOPER, HER HUSBAND, ET AL.

On Error, to Circuit Court, U. S., N. Dist. of Florida.

No. 80.

BRIEF FOR DEFENDANTS IN ERROR.

The action is in covenant and assumpsit founded on a written lease and possession thereunder. (Record 11 to 14).

The case was tried before a jury April 30, 1891, verdict for $6,798.70. Motion for new trial made and overruled and judgment entered on the verdict May 5th, 1891. This is frequently cited in the record as of May 4th. The bill of exceptions and record were in reality never made up until Dec. 9th, 1891, (p. 89) and certain errors in it corrected Jan. 4th, 1892. (p. 90)

The Bill of Exception does not contain all the evidence and does not pretend to. Therefore no error will lie that the verdict and judgment are against the evidence or the weight of the evidence. In fact there is no legal Bill of Exceptions. The paper purporting to be such Bill was filed without being signed (p.64), and was not signed until after court adjourned for the term, and more than 30 days from the trial, no extension having been given, which is contrary to law.

Webster vs. Barnet, 17th Fla., 272.

Potsdamer vs. State Ib., 895, 8th Syllabus.

There was no order extending time for signing Bill 30 days from trial as required by law, which nullifies it.

Temple vs. F. I. & I. Co., 23d Fla., 59.

Even June 8th was too late. Aug. 3d certainly so.

Bush vs. State, 21st Fla., 569.

AS TO MERITS.

The whole defense was based on the presumption that plaintiff below could not prove the due execution of the lease. But the possession and terms of it implied a contract, and they were proven.

The lease was in duplicate. That held by the plaintiff below had never been recorded. It was com-complete as to signatures, acknowledgments and certificate that it was signed, sealed and delivered by witnesses, one of whom was counsel for defendant below, but the corporate seal was lacking. Compare the duplicate original on pp. 24, 25, 26, 27, 28, which being devoid of all file marks and certificates of record, and which was proven to be unrecorded, pp. 28, 29, although all the signatures of the parties to be found and of the witnesses, are there, duly proven, and lacks only the corporate seal, with the original, pp. 29, 30, 31, 32, 33, which being recorded (see bottom of page 33), and in the possession of the defendant below, whose attorney was duly notified to produce this recorded original, and even subpœned to produce it, p. 29,and the Court can glean what was demonstrated to the jury that the original lease had the corporate seal upon it. The two were proper as evidence ; one to prove signatures by indentification ; the other to prove by reason of a duplicate original, that it was duly signed, sealed and delivered and accepted by the defendant below, and recorded by it. That original could, and would have been produced by defendant below if it had had no corporate seal. To bind plaintiff below it was duly sealed and attested, but when defendant was to be bound it was inconvenient of access. The general counsel for defendant company, its Secretary, and its Superintendent, could not on the day of the trial find it !

"The lease was in possession of H. S. Wing, Supt., in his office," (C. F. Warriner, Sec., p. 41) ; but he was not to be had, and as this original was not produced after notice and demand, the certified copy of that original was admitted and legally.

Rev. St. Fla., Sec. 1111 ; Const. of Florida., Art. 16, Sec. 21.

Said Sec. 1111 provides that: "In all cases where any —deed or instrument of writing—is authorized to be and is recorded, a copy thereof, duly certified, shall in all cases and in all courts, be admitted and received in evidence with the like force and effect as the original." This statute was in force at the trial.

The Constitution of 1885 also provides that such "deed, etc., shall be taken as *prima facie* evidence in the Courts in this State without requiring proof of the execution"—*Provided* as in this case—"It be made to appear that the original is not within the custody or control of the party offering such copy."

This recorded copy was in the custody and control of defendant below.

The exception to the admission of the lease is worse than frivolous for upon critical examination, this Court will see that the true certified copy had the word "*seal*" only as to the notaries, and clerk's (37, 38) and also the same word after the name of the Defendant Company, but in the copy inserted in the Bill of Exceptions the words "Notarial" and "official" were inserted in this copy and the seal instead of being placed after the Defendant Company's name was improperly placed after the name of Alexander Wallace, President (p. 86). So also when the receipt of the Defendant Company for the rent of the leased property was written out and the seal attached, it was exemplified by the added word " corporate," and all through this bill, whenever a seal occurs, it is described as a "Notarial," "Official," "Ct. Ct. Ct.," or "Corporate," seal, so as to make appear in the Bill, what did not appear to the jury, or the Court below, that as seals are always described (sic!) and the seal of the Defendant Company to the lease is not described, therefore this last named seal was not a corporate seal!

The jury saw and knew otherwise. The Court below knew from the evidence and the conduct of the agents of the Defendant Company, that this lease was duly sealed with the corporate seal.

And staring them in the face, and this Honorable Court too, but not so plainly, is this: That Defendant Company had either taken undue and fraudulent advantage of the plaintiff below by giving her a lease as a duplicate original which she could not prove the execution of, because the corporate seal was not affixed to it, and therefore by it the plea *non est factum* would be good; while the said Company had a perfect original, duly sealed, which would enable it to bind the plaintiff if any event should arise where the Defendant Company would need to bind the plaintiff ; or if the lease had never been duly executed, the Defendant Company by its agents, had deliberately deluded the plaintiff into the belief that they had, according to an agreement under which she had invested $8,000 at the urgent solicitation, and for the use and benefit of the Defendant Company, executed and delivered to her, a lease ; which, in fact, was mere waste paper ! (pp. 56, 57, testimony.)

This last horn of the dilemma gores too deep, and is not to be chosen. (57 of the record.) For charity,s sake choose the other.

The lease was executed, or it was not executed.

If executed the first horn pins them to the wall and they are, without any doubt whatever, bound by the lease.

If not executed, a fraud would have been committed by the defendant upon the plaintiff, which justified the verdict. Because, the defendant entered upon the premises and used them, and drew revenue from them, and is estopped to deny liability. (p. 39, bottom of page 41. Warriner's testimony.) The defendant company prevailed on the plaintiff to build the house at the ocean terminus of its road, under an agreement that it would lease it exactly as it did apparently lease it, with insurance, or guaranty of insurance. She built it and the defendant took it and used it until it burned down. She performed her part of the agreement, and the defendant will not be heard to say it is not bound to perform its part. It has received the consideration, and if it is impossible to perform, it must return the consideration. Less than this is robbery. Such conduct by the defendant strikes the mind of the common man as unworthy and dishonest, and calls for retribution. The judge on the bench, even more than the jury, puts the stamp of condemnation upon it.

All the facts do not appear upon this record. It is an unusually incomplete record. But enough appears to show that the plaintiff below would have been robbed if the court or jury should have permitted the defendant below to escape liability for the full amount of her claim. By every rule of right or reason that may be conceived the verdict was just and ought to stand. The same verdict will be won every time. But as the contemptible little road was only two streaks of rust and a mortgage, and has been sold, a future verdict would not be worth one cent. To prevent the defendant company from succeeding in its heartless scheme of getting the plaintiffs' property for nothing, and then refusing re-imbursement under the shameless pleas of *ultra vires*, and *non est factum*, this judgment ought to stand. There is nothing appearing of record why it should not stand. The mutilations and clerical errors of the record cannot be twisted into reasons for disturbing this righteous verdict.

ULTRA VIRES.

Look at this plea of *ultra vires*, duly demurred to and with proper ceremony wiped out. As pleaded it was a confession that defendant got plaintiffs' property and kept it, but would not restore it because it was beyond the scope of the powers of a railroad to take what it did take, use what it did use, enjoy what it did enjoy, or pay $800 a year for what it obtained, $900 (39), besides accommodations in the large building for its offices and men (41). The books of the company showed the account with this building, and a large balance in favor of the company.

Ultra vires indeed! But no worse than *non est factum*. *You* signed and are bound. *I* signed but did not seal (?) and am not bound!

It is the same old plea, from the time the first action for injury to the person or damage to property was defended by corporation counsel—that it is *ultra vires*—not nominated in the charter, that a stage, steamboat or railroad, when it is run by a corporation shall be liable for damages. "Show it to us," they say, "in the act, or the charter, where we are permitted to undertake to insure any passenger or freight we carry? Yes, we admit that an individual is liable for damages if he carries passenger or freight and injures or destroys either by negligence, or non-fulfillment of any express or implied contract, but not so the creature of limited and defined powers known as a corporation! No sir! It can hold you, but you cannot hold it!"

The plea has been so often expunged by courts that it seems strange it should ever again be mentioned. But it is the last resort of a hopeless and desperate pleader, and a confession of weakness.

WHAT IS NOT ULTRA VIRES.

Where the transaction is complete and nothing remains to be done by the party seeking relief, the plea of *ultra vires* is not available by the corporation in an action brought against it for not performing its side of the contract.

U. Gold Mining Co. vs. R. M. Nat. Bank, 96 U. S., 648, (648) last par.

U. Nat. Bank vs. Matthews, 98 U. S., 621 (188).

Galveston R. Co. vs. Cowdrew, II Wall, 459, 476, (199).

The pages in parenthesis are those of L. C. Ed. Sup. Ct. Reps.

Smith vs. Sheeley, 12 Wall, 358-61, (430).

York & Maryland L. R. Co. vs Winans, 17 How., 30, (27).

A corporation may do any legitimate act which secures, promotes or insures its existence, or its legitimate profits; but where the act is unauthorized a shareholder may enjoin its execution; and the State may by proper process forfeit the charter. But if it has been executed, the corporation will not be heard to plead want of power. The power was executed, the results have followed and they must be met. What! May any person, natural or artificial, be permitted to profit by its own wrong?

Taylor vs. Chichester and M. R. Co., Law. Rep., 2 Ex. 356.

Robbins vs. Embry I Smede & Marshall (Miss.) Ch. 268-9

A very large proportion of the cases maintaining the doctrine of *ultra vires* are those forbidding corporations to give away, or lease without reserving control, their property and franchises.

The cases are rare where the courts have forbidden a corporation to do that which experience proves to be beneficial, and of course, never when necessary to the profitable enjoyment and use of its franchises and powers. No well considered case can be found where a railroad company has not been compelled to pay rent for an eating house or hotel which it has rented or leased—and thousands have been rented and leased and run by railroad companies.

Under the laws of Florida a corporation "may hold, buy, mortgage, or otherwise convey such real estate as it may require:" McClel. Dig. 228 Sec. 3. And Sec. 23 provides that it shall be lawful to use a common seal and convey by the signature of the President, and in Sec. 10 Par. 3, p 48 of Plaintiff's Brief they are "empowered to lease or buy any land or real estate *not* necessary for its use."

Corporate powers are derived from the legislature either by express grant in words or by necessary and reasonable implication.

Fla. vs. F. C. R. Co.., 15 Fla. 690-9.

The clause in the case at bar, agreeing to insure, was for the protection of the railroad company. If the hotel burned down it could compel re-building and prevent the insured from collecting the indemnity and neglecting to re-build.

"The rule is enforced against corporations as well as against individuals, that the executed dealings of corporations must be allowed to stand for and against both parties when the plainest rules of good faith require it."

By Comstock C. J. in Parrish vs. Wheeler, 22 N. Y. 494, and cited with approval by Miller J. in Thomas vs. Railroad Co., 101 U. S. 71 (951).

In all the cases holding *ultra vires* in a corporation where one side has enjoyed the usufruct of a contract admittedly *ultra vires*, the other side is not forbidden to recover its consideration, or to be restored to its rights. No court has been found so truculent to the demands of these soulless bodies as to permit them to take, buy or lease property and then deny that they ought to pay for the property so bought or leased, according to the terms of the agreement. *Ultra vires* indeed! A new term for excusing robbery, oppression, repudiation.

The proposition is that the defendant leased a hotel from the plaintiff and agreed to pay $800 a year and keep the property insured for $6,000; that the defendant paid the rent, used and occupied the hotel, but did not insure. If it had the plaintiff could collect $6,000. But as it did not insure, the plaintiff has lost her hotel and has lost the $6,000 which the defendant guaranteed she should have in case of destruction by fire. The defendant says: "Yes, you have lost your hotel and lost the $6,000 which I guaranteed you should have in case of such a loss, and it was my fault, and if I was a man I I would pay you; but I am not a man, and I won't pay you, and what are you going to do about it?"

Courts ought not, and surely will not countenance, such downright dishonesty. They have characterized the doctrine of *ultra vires* as "technical," "ungracious," "indecent," and as "shocking to the moral sense," when interposed as a defense to contracts entered into apparently for the benefit of the corporation, and having received and enjoyed the consideration of them, refused to pay for the same, or fulfill their obligations respecting them. Expressions cited by Bigelow J. in Brown vs. Winissmet Co., 11 Allen 326. Even some of the old cases holding *ultra vires* are pronounced as "embarrassing," and "inconsistent with the requirements of the age" which gives the utmost latitude to the rights and powers of corporations, and will never be heard to shield them from the duty of being honest and of paying their debts, and of fulfilling their side of a contract if the other side has done so—unless it can put the party in *statu quo*.

The books are full of cases which permit an injunction to prevent an *ultra vires* act, but which insist that when the act is committed the corporation shall not be shielded from the consequences of it.

Bissell vs. Mich. So. R. Co., 22 N. Y., 258 copied in Field's *Ultra Vires* 117, 129, 132, 133, 136. It holds that a contract legal in itself, founded on a legal consideration must be enforced against a corporation although not within the powers granted, and defies the production of a treatise, or a case holding the contrary. Comstock, C. J.

Silver Lake Bank vs. North, 4 Johns Ch. 370.

So. Life Ins. & Trust Co. vs. Lanier, 5 Fla., 110.

The true measure of the rule is this: "If the act complained of is such as to forfeit the charter, it is *ultra vires*—otherwise it is not, or if the act is against public policy and would be punishable in a natural and accountable person, it is *ultra vires* in a corporation—but if committed it is punishable in damages as well as a human being would be."

But the defendant's counsel will say: "The legislature did not authorize this railroad corporation to insure houses."

Did it ever authorize them to insure lives? No more than to insure houses. And yet if this railroad corporation kills a passenger for hire, who pays only $1.00 for his fare, it may if guilty of negligence, be compelled to pay $5,000.00 or even $50,000.00 damages. I own a house on the line of the railroad. The railroad does not insure my house, and yet if it throws sparks from its engine and burns my house carelessly and negligently, it must pay the damage. How absurd to hold it liable as if an insurer of both lives and houses, when it has given no contract to insure, and release it as an insurer where it has actually made a contract to insure?

"There would seem to be no rule or principle recognized at least in this country, by which an act creating a corporation for certain specific objects, or to carry on a particular trade or business, is to be strictly construed as prohibitory of all other dealings or transactions, not coming within the exact scope of those designated."

Toledo, etc., R. R. Co. vs. Rodrigues, 47 Ill., 188.

Brown vs. Winnissimmet Co., 11 Allen, 326, 334.

"For although the main business of a coporation is to be confined to that class of operations which properly appertain to the general purposes for which its charter was granted, it may, nevertheless, enter into contracts, and engage in transactions which are incidental or auxilliary to its main business, or which may become necessary in the care and management of the property which it is authorized to hold under the act by which it was created."

Ib.; and see Strauss vs. Eagle Ins. Co., 5 Ohio St. 59-62.

Buffett vs. Troy & Boston R. R. Co., 40 N.Y. (Hand) 168.

Arnot vs. Erie Railway Co., 5 Hun. (N. Y.); 608,610.

Downing vs. Mount Washington Road Co., 40 N. H. 230.

City Fire etc. Ins. Co. vs Carrugi, 41 Ga. 660.

"Corporations are presumed to contract within their powers; and general words used in a corporate contract which admit a double construction, must be construed consistently with the charter."

Morris, etc. R. R. Co. vs. Sussex R. R. Co., 29 N. J. (Eq.) 542.

"The plea *ultra vires* should not, as a general rule, prevail, whether interposed for or against a corporation, when it would not advance justice, but on the contrary would accomplish a legal wrong.

Whitney Arm Co. vs. Barlow 63 N. Y. (18 Sick., 62, 69."

The case of Koehler vs. Black River Iron Co., 2 Black, 715, cited by plaintiff's attorney, is a sample of the cases where *ultra vires* is sustained as a plea. The Company there fraudulently elected officers to execute a fraudulent mortgage, and although the corporate seal was attached it was surreptitiously done, and the whole transaction was pronounced fraudulent and void, but is cited by counsel to sustain the doctrine that the existence of authority must be proven. So also Thomas vs. R. R. Co. 101 U. S. 71 cited for plaintiff. The lease gave away the road, rolling stock and franchises, which is pronounced against public policy and void—*ultra vires*; but is cited to prove all leases void, including the lease at bar, although made that plaintiff's railroad might be operated by having a building on the ocean terminus. If the lease had not been entered into the Eastern terminus of plaintiff's railroad would have been on the uninhabited desert sands of the Atlantic ocean! Furnishing quarters for train hands, offices and passengers, *ultra vires* forsooth!

THE LEASE AND OCCUPATION WAS RATIFIED.

The directors, secretary, superintendent and in fact all of the officers knew of the lease, had talked about insurance, and used the hotel premises. An account with the hotel was kept in the books of the company. The Record bristles with facts which show that the act of the corporation through its president had been fully ratified, and the usufruct of it enjoyed by the officers of the road. If the minutes would have shown no direction to lease, the acts of the managing officers ratified the lease.

IMPOSSIBILITY OF PERFORMANCE.

As the pleadings stand, this is an impossible plea. As it is not against the nature of things that a hotel may be insured, there is nothing apparent of record to justify the plea. On the contrary, the true ground for the so-called impossibility of performing the contract dare not be stated, for then it would be clear that it was only too expensive, or that the insurance agent or agents called upon declined to name the premium, and the fulfillment of the obligation to insure was a troublesome and difficult and expensive task, and it was dropped.

Benj. on Sales. Am. notes to secs. 560 to 609, p 553: "Disability is a very different thing from impossibility."

The plea to be good must be a real impossibility and not merely a very great inconvenience, hardship, or impracticability.

Oakley vs. Morton, II N. Y. 25. Smoots case 15 Wall, 36, (107–10).

Jones vs. U. S. 96, U. S. 24, (644–6).

But it was proven not to be impossible to insure, for the lessee of the defendant insured the furniture (44, middle of page), and all the contents of the house.

The Jacksonville agents of Insurance Companies, who were approached, had orders not to insure HOTELS. They never tried anywhere else. They did not try very hard in Jacksonville, nor at all in Savannah or New York.

The attempt to shoulder part of the blame on the plaintiff's attorney for not insuring was futile, for he never had any knowledge of the matter nor asked anything about insurance until just before the fire—long after the lease was made—only 18 months before the trial which was in April, 1891 (43). Lease was made June, 1888. Plaintiff below never tried to insure—only inquired if insurance had been effected.

The citation of Jones vs. U. S. 96, U. S. 29, (644) by plaintiff's counsel here, is most unfortunate for him. Why, the court says in this case:

"Impossible conditions cannot be performed; and if a person contracts to do what at the time is absolutely impossible" (note the word "absolutely") "the contract will not bind him, because no man can be obliged to perform an impossibility; but where the contract is to do a thing which is possible in itself" (such as insuring a building) "the performance is not excused by the occurence of an inevitable accident or other contingency, although it was not foreseen by the party, nor was within his control." Such as in this case the raging of a yellow fever epidemic just 30 days after the lease was executed (p.45), which drove many insurance companies and agents out of Jacksonville and swept away some of them in death, (47 record), which made summer hotels there extraordinary risks and placed them for sometime thereafter on the prohibited list of some companies. This was "not foreseen, nor within his control." The plaintiff company swore in its 3d plea (16 record), that "said impossibility of performance was not known at the time of making the contract."

The last clause of the decision in Cook vs. Andrews, 36 Ohio St. 181, cited by plaintiff here, is even harder on him than Jones vs. U. S. But it is a waste of paper o quote it. His other citations are equally unfavorable o his views.

AS TO CORPORATE SEAL:

If this court should even suspect that the duplicate lease recorded by the defendant below was not sealed, although it actually was, the following is submitted:

"An instrument purporting throughout the body thereof to be a mortgage of personal property by a corporation, is the deed of the corporation, although signed by the President, only, with his own name and title, and sealed with his individual seal."

Sherman vs. Fitch, 98 Mass. 59.
Lay vs. Austin, 7 So. Rep. 143.
South Baptist Society vs. Clapp, 18 Barb, 36.

The ancient rule applied to corporations existing by the common law. that they could act only by their corporate seal, has no application to corporations created by statute.

Curry vs. Bank of Mobile, 8 Port. (Ala) 361.

This honorable court has abolished the ancient rule, summarily and conclusively, and satisfactorily too:

Story J. in Bank of Columbia vs. Patterson, 7 Cranch, 306 says: "The technical doctrine, that a corporation could not contract, except under its seal, or, in other words could not make a promise, if it ever had been fully settled, must have been productive of great mischiefs. Indeed, as soon as the doctrine was established that its regularly appointed agent could contracts in their name without seal, it was impossible to support it; for otherwise the party who trusted such contract would be without remedy against the corporation. Accordingly it would seem to be a sound rule of law that wherever a corporation is acting within the scope of the legitimate purposes of its institution, all parol contract made by its authorized agents are express promises of the corporation;

and all duties imposed on them by law, and all benefits conferred at their request raise implied promises, for the enforcement of which an action may well lie. And it seems to the court that adjudged cases fully support the position," and cites:

Bank of England vs. Moffat, 3 Bro. Cg. Rep. 262.

Rex vs. Bank of England, Doug. 524 and note.

Gray vs. Portland Bank, 3 Mass. Rep. 364.

Worcester Turnpike Corporation vs. Williard, 5 Mass. Rep. 80.

Gilmore vs. Pope, 5 Mass. Rep. 491.

Andover and Milford Turnpike Corporation vs. Gould, 6 Mass. Rep 40.

Story, in Bank, U. S. vs. Dandridge, 12 Wheat, 67–8, says:

"In ancient times it was held that corporations aggregate could do nothing but by deed under their common seal. But this principle must always have been understood with many qualifications; and seems applicable to acts and votes passed by such corporations at corporate meetings. It was probably in its origin applied to aggregate corporations at the common law, and limited to such solemn proceedings as were usually evidenced under seal, and to be done by those persons who had the custody of the common seal, and had authority to bind the corporation thereby as their permanent official agents. Be this as it may, the rule has been broken in upon in a vast variety of cases in modern times, and cannot now, as a general proposition, be supported. Mr. Justice Bayley, in

Harper vs. Charlesworth (4 Barnw. & Cresw., 575), said: "A corporation can only grant by deed; yet there are many things which a corporation has power to do those covenants as if he had signed and sealed the deed, which, however, is never done by the covenantee of a deed. Therefore, where the grantor of a deed inserts covenants for the grantee to keep, and the grantee breaks those covenants, the grantor has an action in covenant against the grantee, and can bind him to the covenants to the same extent as if he had been a party to the indenture and had signed and sealed.

Spencer's case in 1st Smith's Leading cases, 129 is the leading case.

Barrow vs. Richard, 8th Paige, 351.

Broward vs. Jones, 23 Barb., 133,

And numerous other cases there cited fully maintain the doctrine "That the grantee of an indenture, although he may not himself, have signed and sealed the indenture at all, is liable for breach of covenant to the same extent as if he had signed and sealed it."

Another very similar illustration is where the purchaser of land encumbered by mortgage, accepts a deed which contains the clause that the grantee assumes payment of the mortgage as part of the purchase money. If he accepts that deed and goes into possession, he makes himself liable for the mortgage although he never executed the mortgage, never endorsed the note, and his name does not appear in it in any connection except as receiving the land encumbered by mortgage, with the covenant that the payment of the mortgage is part of the consideration.

So in the case at bar. The lessee goes into possession under a covenant made by the lessor, that the lessee will insure which is part of the consideration for his possession and tenancy. His entering into possession makes him just as much liable in damages for breach of covenant to insure as he would have been for rent if he had failed to pay rent. The reason for the rule is just and wise. A man cannat receive the benefits of a conveyance without responding in consideration. If he assumes consideration and obtains the benefits he must pay the consideration, although his assumption may be imperfect, and in fact only presumptive. Here the defendant below agreed to pay rent and agreed to insure. It paid rent but did not insure—only part of the consideration has been paid and we now ask damages for the failure to perform the balance of the consideration.

On page 176 of 1st Smith's leading cases, the learned commentator lays down the following proposition, with the authority :

"And when the lease contained a covenant on the part of the lessee to insure the demised premises, with a stipulation that he should have the right to use the proceeds in rebuilding in the event of loss, the assignee of the reversion was held entitled to its benefit, and the assignee of the term subject to its burden, although assigns were not named, and the intention to bind them was deduced inferentially from the end in view, and the means employed."

Masury vs. Southworth, 9 Ohio St., 340.
See also Platt on Covenanants, 3 Law Lib., 81.
6 Gill & Johnson, 372.
Vernon vs. Smith, 5 Barn. & Ald., 1.
Taylor, Landlord & T., 167.
Norman vs. Wells, 17 Wend, 136.
Kellogg vs. Robinson, 6th Vermont, 276.

And so, if the assignee of a lease is bound to insure, if the lessee is so bound, it is plain that the covenantee may not be under seal, for the assignee is not under seal. He takes the term subject to its burdens, and is as much bound to bear those burdens as if he had *under seal* covenanted to bear them.

And if the grantee of land is bound to pay a mortgage on the land when the deed is made, if that mortgage is part of the consideration, by the same token and by stronger bond, the lessee of land is bound to insure if the lessor puts the covenant to insure in the lease, even although the lessee may not have joined in the covenant otherwise than by entering upon the term knowing that insurance was part of the consideration for the lease.

The covenant to insure is not a personal covenant, but is such a covenant as may run with the land if the money realized is to be expended in rebuilding or repair.

Masury vs. Southworth, 9 Ohio St. 341.

AS TO JOINDER OF DIFFERENT ACTIONS.

They may be joined in Florida—about all except replevin and ejectment.

McClelland's Digest, page 829, Sec. 71.

Assumpsit and covenant are joinable and were joined. Plaintiff's counsel read the amended declaration too hastily.

In fact no form of action need be mentioned, or if mentioned, it shall not preclude any other action in the same rights and against the same parties.

McClelland's Digest 810 Sec. 1, 3, 5 and 829 Sec. 71.

ABSTRACT PRINCIPLES OF LAW INAPPLICABLE OUGHT NOT TO BE CHARGED.

The court was asked to give several of these. The President of the company was the proper agent by law to sign a lease or deed. He is not in the proper sense a special agent, but in the largest sense a general agent in all such matters (p 52 record, 25 brief).

Some of the charges are faulty in grammatical construction and properly refused on that account. Faulty in response to the pleas are others. The demand upon the court was: If the ordinary or reasonable means were used and failed, the act was impossible! The burden of the charges asked is not that insurance was impossible, but probably difficult. The plea was "impossible"

The 5th, 6th and 7th errors alleged in the Brief like many others answer themselves. If well taken death would abate every action, for no witnesses could testify to anything a dead man had done.

TENTH ERROR ASSIGNED.

The original paper of which an unidentified, uncompared, unproven copy was offered, would have been incompetent and irrelevant. Of course the copy was properly excluded. Even if the original had been competent this copy was not—if it was a copy—for the original was neither accounted for nor applied for.

ELEVENTH ERROR ASSIGNED.

The plaintiff in error cannot be heard to take advantage of its own wrong. If, by omitting to put in their minutes the record of this transaction, they can get the use of the defendant's property for nothing and let it burn down, to her loss, by their carelessness and neglect, they had better hereafter do all their business this way, and other railroads likewise, for they have no account to render hereafter to the great Judge of the quick and the dead, and no consciences to lash them here.

TWELFTH ERROR—IS LIKE THE ELEVENTH.

The admission as testimony made the lease the contract. The court had to decide as to its admissibility.

FOURTEENTH ERROR.

The judge's charge left the whole question of possibility or impossibility to insure to the jury. But the idea that such a building as this in Duval County, Florida, could not be insured for three-fourths its value is so absurd and preposterous that it is idle to discuss it. A few agents in one place were applied to and refused. *Non constat* that some other agent in the same place, or some other company elsewhere would have insured (p. 46). The contents were insured. (p. 44, middle of page).

FIFTEENTH ERROR.

The plaintiffs in error called in several witnesses who testified so recklessly and outrageously about the value of the hotel in controversy, a large building 40 by 50, three stories high, attic, sealed and finished over the three stories, making really a four story building with over 40 rooms, large halls, and wide piazza around three sides, that it might be built for such a ridiculously small sum that the charge given was called for.

This was offered as expert evidence. Other expert evidence was offered; not half of it is in the bill. Must a jury be ruled by the number of expert witnesses, or by the real value and credibility of the so-called experts? Their testimony is not to facts, but to opinions. The jury are at last the only experts, and they must, because of the nature of such testimony, use their own brains, their information from every possible source, including their own knowledge of the affairs of life. If a dozen witnesses who call themselves experts swear that a certain building cost only $3,000, which every member of the jury believes could not have cost less than $10,000, and only one witness swears that it cost $10.000, that jury must be permitted to weigh the testimony and pass upon its credibility, and their finding is conclusive. They may "measure the testimony by their judgment and experience." Otherwise, ignorant men only must be jurors, and intelligent, well-informed men never!

"The opinion of experts, however intelligent and trustworthy, do not bind the conscience of the court."

The Iberia 40, Fed 893.

VanWycklynn vs. Brooklyn 118, N. Y. 424.

Shelley vs. Austin 74, Tex 608.

Schneider vs. Barney 113, U. S. 645 (1130) last two paragraphs.

SIXTEENTH ERROR—

Is unworthy of notice. The plaintiff here agreed to pay. Did it pay? The affirmative is on the obligor. But plaintiff's counsel mutilates the court's charge. Compare 14th error of brief (p. 13) with record (p. 62).

SEVENTEENTH ERROR.

The law as laid down in the brief is not in accord with the law from McClellan's Digest, part of which on Corporations is copied. 3d par. of sec. 10, p. 277 (48 plaintiff's brief) gives a railroad company power to lease real estate not necessary for its use. Sec. 23, p. 233, makes it lawful to convey land by deed sealed with the common seal and signed only by the president of the corporation. A corporate seal is only necessary to convey lands. This *may* be used (not *must*), and may be altered at pleasure.

McClellan's Dig. 228, Sec. 3.

AS TO BY-LAWS.

How can anyone but the officers of this company be governed by its by-laws? They are not public laws. No one is bound to know them. There is no pretense they were ever published, as required by Sec. 35, p. 235, McClellan's Digest. They are not proven to have been passed when the lease was made. They were not evidence against the plaintiff below. The minutes and by-laws would have cumbered the record with a mass of irrelevant stuff. Strange that they should want it!

SIXTEENTH ERROR IN BRIEF:

The jury would have been grossly and inexcusably misled if the court had charged that guilty knowledge of the impossibility of insuring invalidated the contract; for there was not a scintilla of evidence, nor even a suggestion of suspicion, that anyone knew it, and could not have been for no one did know it, and no one did know it, because it was not impossible, and any evidence tending to show it impossible would have been ruled out as incompetent, because the defendant below swore in the 3d Plea (p. 16 record) that "the impossibility to insure was not known at the time of the alleged making of the alleged covenant to insure!"

The counsel for plaintiff in error has sub-divided and split up the assignments of error of record into several additional errors in his brief. I protest against this. By so doing he has virtually made new assignments.

Errors must all be assigned on or before citation. They cannot be amended afterwards. The changes—amendments—have caused confusion and provoking mistakes. Instead of improving they have destroyed the errors really assigned. But they needed doctoring, and this has not restored them.

MEASURE OF DAMAGES BY PLAINTIFF'S COUNSEL.

The measure of damages by opposing counsel, under the "covenant and agreement" in the lease to insure for $6,000, is solemnly averred to be the "costs of obtaining such insurance" (43 brief)! And he actually cites Benjamin vs. Hilliard, 23 Howard, 49 (which, like many other of his facts, is very imperfect and incorrect, for it should be 149), in which case the court, quoting from Alder vs. Keighly, 15 M. & W., 117, says: "No doubt all questions of damages are, strictly speaking, for the jury . . . . . and here is a clear rule: That the amount that would have been received if the contract had been kept is the measure of damages if the contract is broken."

But this is on a level with all of his arguments. Desperate cases require desperate methods. The supreme courts of all English speaking nations must adopt a new rule. If a house is insured the owner can only recover the costs of insurance! If a man is killed by the negligence of a railroad company, his legal representatives can only recover what it would have cost to insure his life! The penalty for negligence is to be the cost of being diligent, not what will properly reimburse the victim of negligence!

The evidence injected into this case to show diligence in fulfilling the contract to insure is much of it incompetent and worthless. The plaintiff's counsel thinks that reasonable efforts are sufficient. The courts all differ from him. They say that diligent efforts are necessary. But this case requires new rules, and citations of authorities are inconvenient and dangerous, and therefore none were made on this point—or at least only one from an obscure report not accessible. I respectfully submit that no case in any book can be found that would hold that such efforts as were made in this case to obtain insurance were "diligent," or even as counsel says is all right for this one case, "reasonable."

When twitted for their negligence they asked two or three agents. They had a good-natured and jocular conversation with the writer, which, however, disclosed the fact that they knew they were liable for $6,000 if they got no policy. Capt. Wallace, the president, *was the company*—held nine-tenths of the stock.

Some of the blunders, omissions and hasty corrections of the record may mislead. For instance, the written record, page 83 (being p. 39 of the printed) should follow immediately after page 73 (p. 34 of the printed), and all from p. 73 to p. 83 should follow p. 170 (p. 88 printed record). The copy of the lease on said p. 34 was not sworn to until Dec. 9th, 1891, nor filed until that day (See top of p. 39), while the record following (from p. 39 to p. 65 printed record) was of transactions which took took place April 30th, 1891, and filed June 8, 1891.

And the pleas were numbered after the record was made up, as an examination of the demurrer (p. 17) will show. But this is of little or no consequence. Other inaccuracies may be. Plaintiff's counsel excepts (p. 39) to the introduction of the copy of the lease, to-wit on p. 29 to 34; not that on 34 to 38. This last copy would be exceptionable. But notice, that said counsel does refer to the proper copy found on p. 29 to 34. But I beg of this court to take particular notice that the lease offered as a certified copy must have been an original or it could not have been recorded (bottom of p. 33) and could not have been Mrs. Hooper's duplicate original for hers was never recorded (24 to 28). There was no file mark on it; no certificate, which must have been there if it had been recorded (p. 58).

The counsel for the plaintiff here did not try the case below, and has very hastily read the record here. The references he has made to the writer are not accurate, nor just; and entirely unwarranted is the attempted use of F. O. Nichols testimony (48 record) who did not testify as quoted in plaintiff's brief (p. 41.), nor did the witness utter one single word of competent evidence.

The short limit allowed defendant's counsel to get-up this brief, prevents him from referring to, much less correcting, all the inaccuracies of plaintiff 's statement. Although the counsel for plaintiff and defendant reside and practice law in the same city, with offices within a square of each other, the plaintiff's brief of fifty pages was never seen by defendant's counsel until three days ago, and knowledge of such a brief was first obtained after this case was called for trial, the general counsel for plaintiff who tried the case having announced that he would not file a brief, nor did he even suggest for he did not know that a brief for plaintiff would be prepared.

There is no error of record which injures the plaintiff here. There is no assignment of error which the record supports and the law shows to be well taken. Some of the forced errors were corrected (pp 86 and 90). There are clerical errors which may be overlooked, for nearly all the record was made up from memory. But the hardship and wrong that would be done this defendant here by ordering a new trial would be to her a denial of justice and a destruction of all hope of ever recovering a dollar of her losses, caused solely by the negligence, fault, misfeasance and malfeasance of the plaintiff here.

JAMES R. CHALLEN,
Counsel for Defendant in Error.

Jacksonville, Fla., Nov. 25, 1895.

Office Supreme Court U. S.
FILED.
DEC 9 1895
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

NO. 80.

THE JACKSONVILLE, MAYPORT, PABLO RAILWAY AND NAVIGATION COMPANY, PLAINTIFF IN ERROR.

vs.

MARY J. HOOPER, HENRY H. HOOPER, Jr., HER HUSBAND, AND WILLIAM F. PORTER, FOR THE USE OF MARY J. HOOPER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

BRIEF OF ATTORNEY FOR PLAINTIFF IN ERROR, IN REPLY TO BRIEF OF DEFENDANT IN ERROR.

J. C. COOPER,
Attorney for Plaintiff in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

Jacksonville, Mayport, Pablo Railway
and Navigation Company,
Plaintiff in Error.
vs.
Mary J. Hooper et al.
Defendant in Error.

BRIEF OF ATTORNEY FOR PLAINTIFF IN REPLY TO BRIEF OF DEFENDANT IN ERROR.

There are in brief for defendant in error a number of erroneous statements of fact and also a number of statements of fact not found in the record, and which we desire to correct.

Action in Covenant.

The counsel for the defendant in error commences his brief by stating that this was an action in Covenant and Assumpsit founded on a written lease.

An examination of the declaration and amended declaration will show that the suit was *in Covenant* and not in "*Covenant* and *Assumpsit.*" All of the counts in the declaration referred to the agreements and covenants in a *sealed indenture* and the last clause in the declaration stating the breach and ground for suit referred to the *covenants of the* indenture sued upon as the basis of the suit. The word "*Promised,*" which is the distinctive mark of an action in *Assumpsit,* does not appear anywhere in the declaration or amended declaration. It was therefore an action in *covenant* against this corporation, upon a contract not having thereon the defendant's corporate seal, and upon which the action of covenant would not lie.

But if the statement of the counsel for the defendant in error was correct that it was an action in covenant and assumpsit, the demurrer of the defendant company should still have been sustained. If the action was upon an unsealed instrument in *assumpsit,* so much of the declaration as was in "*covenant*" was improper, and the demurrer thereto should have been sustained. On the other hand, if, as counsel for defendant in error also contends, the lease was the *sealed* instrument of the defendant, then so much of the action as was *assumpsit* was improper, and the demurrer should have been sustained thereto. In any view of the pleadings, even under the statement of the counsel for the defendant in error, this cause was tried under an improper form of action, and the demurrer of the defendant was improperly overruled to the declaration and amended declaration.

Bill of Exceptions.

The objection is made in the brief of the defendant in error that the bill of exceptions does not contain *all the evidence*, and that error could not be assigned that the verdict and judgment are against the evidence.

There is no such assignment in this case. This argument in counsel's brief only serves to show that most of the brief is based on the notion that this court reviews questions of fact, which the court has often decided it will not review. The brief of the defendant in error attempts to discuss many questions of fact, both in the record, and a great deal of it *de hors* the record, as if the case were before a jury in a trial court. The bill of exceptions contains the evidence as applicable to each question of law assigned as error in this court, and that is all that is required by the practice in this court.

It is further urged, with no warrant for it in the record, that the bill of exceptions was not signed until after court adjourned, and more than thirty days after the trial, *without any extension having been given.*

The counsel here confuses the practice in the State of Florida, which requires an order of the trial court to extend the time for making up a bill of exceptions after the term, and cites several Florida cases to this effect. The State's practice has no bearing whatever upon a bill of exceptions in this court.

As a matter of fact, the bill of exceptions was signed during the term of court.

The counsel for the Plaintiff in Error states that the bill of exceptions and record were in reality never made up until December 9th, 1891; pages 89 of the Record. This is not a correct statement as to the signing of the bill of exceptions. The court states, on pages 64 and 65 of the record that the bill of exceptions was presented to the court and approved and intended to be signed June 8th, 1891, but inadvertently was not signed until August 3d, 1891, as of June 8th, 1891. There is nothing whatever in the record to show that the term of court ended before the 8th of June, 1891, or before the 3d of August, 1891. The verdict and judgment was entered on May 4th, 1891. The bill of exceptions recites that the defendant, by its attorney, on the 8th of June, 1891, "*at the term aforesaid, on notice to the plaintiff's attorney and in his place in court proposed this his bill of exceptions, etc.*" See page 64 of the Record. This clearly shows that the bill of exceptions was settled and signed during the term, and nothing appeared in the record to the contrary. The court will take judicial notice that the term of court at Jacksonville, Florida, of the lower court began on the first Monday in December.

See U. S. Revised Statutes, Section 572.

It is further true that the custom of that court is to adjourn the term from time to time, in effect keeping the term of court in operation for such purposes as interlocutory matters until the next term begins, and even if the record did not distinctly show, as it does, that the bill of exceptions was signed in the term nothing appeared to the contrary, it would be so presumed.

The Lease Not Sealed With the Corporate Seal.

The counsel for the defendant, in his brief, insists that the lease had the corporate seal upon it, but he does not point out any portion of the record to show this fact, and there is no attestation or statement by any officer annexed to any copy of the lease introduced to show the attaching of the corporate seal to the lease. But it is perfectly clear, both from the duplicate and from the certified copy introduced, that the paper only had upon it a scrawl opposite the name of the President, who signed the paper; and the testimony of H. H. Buckman, counsel, who drew the lease, states (see page 57 of Record) that he knew of no copy erence to the subject matter of this hotel, other than the signature appearing upon the paper. There is no evidence whatever that the defendant had any dealings with the plaintiff. The plaintiff's own witness, Warriner, states, page 41 of the Record, that there was no record that the company or the board ever leased or rented the property and that the accounts do not show the payment of the rent.

It is further stated by the counsel for the Defendant in Error, on page 5, that the defendant company prevailed on the plaintiff to build this house, also that the defendant took it and used it and has received the consideration; and this same argument later on in the brief, on pages 13 and 14, is used to prove ratification. We submit that there is no evidence to sustain this contention. The only testimony as to any action of the company or its officers or directors, is the testimony of Warriner, page 41 and 42 of the record, and this testimony tends to prove exactly the contrary, because Warriner distinctly states that he never had any directions in reference to leasing from the directors of the company, and neither the directors or company took any action on the subject of this hotel at all. The witness Roberts, page 40, says that she was to get a lease from Capt. Wallace, but no lease was ever signed. Wallace is the only one who had any direct connection with this alleged contract, and these statements made in the brief of the Defendant in Error were not justified by the record. In fact, on page 6 of the brief of counsel for Defendant in Error, states that some of the facts do not appear on the Record.

But the plaintiff never sued upon this alleged lease as a contract *ratified or adopted* by defendant company, but as the originally executed contract of this company. The plaintiff below never replied to defendant's plea of *non est factum* that this contract had been ratified. No charge was asked by the plaintiff or given by the court that this alleged lease was ratified by defendant, or in reference to any use of the alleged property by defendant; the issues made and tried on this subject were, "Did the defendant execute this lease?" and "Did the President have any authority to sign the company's name to the lease?" This contention about the defendants receiving benefits from the lease and of alleged ratification, are raised for the first time, so far as the pleadings and record show in the Appellate Court, and ought not to be considered here at all, if they were supported by the evidence, which they are not.

It is further stated on page 6 that the defendant got the use of the property for $800, for which it obtained $900, besides accommodations in the building for its officers and men. We submit that an examination of the pages of the record counsel refers to do not show any such state of facts. There is nothing whatever in the testimony referred to to show that the company ever used the building for its officers or any other purpose. All of the argument on pages 9 and 10 as to the *ultra vires*, in which many expressions are used about robbery, oppression and repudiation, etc., and the authorities cited refer to cases where the proof directly showed that the company did make the contract, or did in fact adopt the contract, but that has no application to the case at bar.

Insurance by Railroad Companies.

The counsel for defendant in error, on page 11 of his brief, argues that this covenant for insurance attempted to be made in the name of this railroad company was not *ultra vires*, and likens it to the liability upon a railroad corporation for killing a passenger, or for burning down a building by sparks from an engine. Of course, there is no analogy whatever between the case at bar and the examples cited. In the example of the killing of a passenger, or the burning of a building by sparks, the corporation would be held on the ground of negligence, if such negligence could be shown, and not on the ground of contract at all. On the other hand, in the case at bar an attempt is made to hold the defendant company upon an express contract to insure a building, where the laws of Florida, under which it is chartered, and the by laws of the company, show that no such purpose was within the scope of its corporate existence.

Impossibility of Performance.

On page 14 of the Record, counsel for defendant in error states, as a matter of fact, that the reason for not obtaining insurance was that it was too expensive, or that the agents declined to name a premium. He further states that it was not proven to be impossible to insure, because the lessee of the defendant had insured the furniture. On page 15, he states that the reason why defendant's insurance could not be procured was that yellow fever prevailed in Jacksonville and drove many companies and agents out of Jacksonville, and this made summer hotels extraordinary risks. A careful reading of the testimony will show that none of these statements of fact, as to the reasons why the insurance could not be procured, are borne out by the record. The witnesses distinctly stated that it was the *character of the risk* that made it impossible to get insurance from any company upon it; that such property *was not rated* for insurance at all.

One of the witnesses, Dawkins, stated that the companies represented by him, doing business all over the United States and foreign countries, would not take the risk at any premium.

It is further urged that the plea of the defendant company in the case stated that the impossibility of insurance was not known at the time of making the contract. This clearly means that it was not known *by the defendant*, for of course it could only state in its plea what its knowledge was, but there was evidence in the record tending to show that one of the plaintiffs ~~in error~~ below had made application for insurance on this property himself and failed to get it, and knew it was not insurable.

I shall not undertake to take up each of the statements and so-called arguments made in the brief of the defendant in error, because I have gone over the law points in this case in the original brief filed for the plaintiff in error, which I here refer to, as an answer to the brief of the defendant in error.

I call the Court's attention, however, to the erroneous statements of fact mentioned above, and I again repeat that upon a careful reading of the brief for the Defendant in Error, the Court will find that, except the one point that a corporation may contract without its seal, covered by pages 16 to 19 of the brief of the Defendant in Error, that none of the questions of law in this case are discussed, or authorities cited thereto, but that the rest of the brief is a declamation and a mere attempted statement of alleged facts.

I again urge the matters of law, as to which the Court erred, fully set forth in the original brief for the Plaintiff in Error filed in this case, and respectfully insist that for those errors of law, the judgment should be reversed.

J. C. COOPER,
Attorney for Plaintiff in Error.